143—281

RECORD, CASE No. 14,509.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1051.

EDWARD H. HORNOR, APPELLANT,

vs.

THE UNITED STATES AND JOHN W. JACOBUS, INDIVIDUALLY AND AS MARSHAL OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 28, 1891.

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1 To the honorable the circuit court of the United States for the southern district of New York:

The petition and complaint of Edward H. Horner respectfully shows to this court—

I. That at all the times herein mentioned he was and now is a resident of the city and county of New York, in the State of New York, in the southern district of New York.

II. That your petitioner is imprisoned and restrained of his liberty and in the custody of and by John W. Jacobus, marshal of the United States for the southern district of New York, and John A. Shields, United States commissioner for the southern district of New York.

III. That he has not been apprehended and is not detained by virtue of any judgment or decree *or* any court of the United States or of any court whatsoever.

IV. That the cause or pretense of the imprisonment and restraint of your petitioner is an arrest by virtue of an alleged bench warrant unlawfully and illegally issued out of the district court of the United States for the southern district of Illinois, dated thirteenth of January, A. D. 1891, directing and ordering the apprehension and arrest of one Edward H. Horner, late of the southern district of Illinois, for an alleged violation of the laws of the United States, for which the said Edward H. Horner, late of the southern district of Illinois, was, as is there alleged, *was* indicted by grand jurors
2 of the district court of the United States for the said southern district of Illinois; that a certified copy of said alleged indictments accompanies the said bench warrant, and said indictment- your petitioner is informed and believes and alleges that the same are defective, unlawful, and null and void, and are not in fact for and do not charge the commission of any offence which is an offence against the laws of the United States; that said bench warrant is based on the said indictments, and is, as petitioner is informed and believes, and the petitioner avers and alleges it to be, defective, unlawful, and null and void; that the said John W. Jacobus and the said John A. Shields, Esq., are restraining your petitioner of his liberty for the purpose of removing him to the said southern district of Illinois for trial upon the alleged offences charged in said indictment-, and they are about to cause your petitioner's removal to said southern district of Illinois to be tried upon the said indictments for offences therein alleged to have been committed, if at all, in the southern district of New York, and your petitioner alleges that he has a right to a trial therefor under the constitution in said last-named district; that, as petitioner is advised and believes, said indictments and bench warrant are unconstitutional and without jurisdiction and void, and your petitioner is restrained of his liberty thereunder, against his rights under the Constitution and laws of the United States and unlawfully and without authority, under guise and color of proceedings in the dis-
3 trict court of the United States for said southern district of Illinois.

Wherefore your petitioner prays that your honorable court will order a writ of *habeas corpus* to issue out of this court to the said John W. Jacobus, marshal as aforesaid, and the said John A. Shields, Esquire, as commissioner as aforesaid, requiring them to produce the body of your petitioner before this court at some time to be designated in said writ, then and there to abide what shall be ordered by this court in the premises, and in the meantime your petitioner prays that he may be committed to the custody of his counsel, Alfred Taylor and Herman Aaron, attorneys of this court, and at the same time your petitioner prays that this honorable court will direct a writ of certiorari to issue from this court to the said John A. Shields, commissioner as aforesaid, ordering and requiring said commissioner forthwith to certify to this court true copies of the alleged bench warrant, indictments, and other papers and proceedings relating to the premises against your petitioner and under which he is now deprived of his liberty.

And as in duty bound your petitioner will ever pray, &c.

Dated January 23d, 1891.

ALFRED TAYLOR,
HERMAN AARON,
Attorneys for Petitioner, 15 *Wall Street, New York City.*

EDWARD H. HORNER, *Petitioner.*

4 SOUTHERN DISTRICT OF NEW YORK, } *ss:*
City and County of New York, }

Edward H. Horner, being duly sworn, says: I am the petitioner and complainant hereinbefore named, and each and every allegation of the foregoing petition is true. No previous application neither for the writ of certiorari nor *habeas corpus* herein has been made.

EDW. H. HORNER.

Sworn to before me this 23d day of January, 1891.

ADDISON BROWN,
U. S. Judge.

Endorsed: U. S. circuit court, so. dist. N. Y. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*, etc. Petition and order for writ. Alfred Taylor, Herman Aaron, attorneys for pet'r, 15 Wall street, New York. U. S. circuit court. Filed Jan. 23, 1891. John A. Shields, clerk.

5 At a stated term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city, county, and State of New York, on the 23rd day of January, 1891.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus* and a Writ of Certiorari.

On reading and filing the foregoing petition hereto annexed and

upon motion of Alfred Taylor, Esquire, and Herman Aaron, Esquire, attorneys for the petitioner—

It is ordered that writs of *habeas corpus* and certiorari issue to the Honorable John W. Jacobus, marshal of the United States, and Honorable John A. Shields, United States commissioner, respectively, as prayed for in the said petition, the said writs to be returned, with the return of said marshal and the said United States commissioner thereto, on the 23d day of January, 1891, at 2½ o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, at the post-office building, in the city and county and State of New York, at a stated term of this court, then and there to be heard.

E. HENRY LACOMBE.

6 [SEAL.] The President of the United States to Honorable John W. Jacobus, marshal of the United States for the southern district of New York, and Honorable John A. Shields, United States commissioner, Greeting:

Habeas Corpus to Bring Up Person.

We command you that you have the body of Edward H. Horner, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Edward H. Horner shall be caused or charged, before a stated term of the circuit court of the United States for the southern district of New York, to be held in the post-office building of the city and county and State of New York, at 2.30 o'clock p. m. on January 23d, 1891, to do and receive what shall then and there be considered concerning the said Edward H. Horner, and have with you then and there this writ.

Witness Honorable Melville W. Fuller, Chief Justice of the United States, on the 23rd day of January, 1891.

JOHN A. SHIELDS, *Clerk.*

ALFRED TAYLOR & HERMAN AARON,
Petitioner's Attorneys, 15 Wall Street, New York City.

7 In obedience to the within writ, I do herewith produce the body of the within-named Edward H. Horner, together with a "warrant of removal," issued by the district judge of the southern district of New York, which "warrant of removal" shows the time and cause of said Edward H. Horner's present imprisonment and detention.

N. Y., January 23, '91.

JOHN W. JACOBUS,
U. S. Marshal, S. D. N. Y.

Prisoner remanded to custody of marshal. Bail in $5,000 to be taken for his reappearance on Feb. 3rd, 1891, at 10.30 a. m., to abide further order of court.

E. H. LACOMBE.

Defendant discharged on bail for his appearance before Judge Lacombe Feb'y 3, 1891, at 10½ o'clock.

Jan'y 23, 1891.

JOHN A. SHIELDS,
U. S. Comm'r.

Endorsed: U. S. circuit court, so. dist. of N. Y. In the matter of the application of Edward H. Horner for *habeas corpus*. Writ of *habeas corpus*. Alfred Taylor, Herman Aaron, attorneys for pet'r, 15 Wall street, New York. Allowed. E. H. Lacombe. Writ dismissed. E. H. Lacombe. U. S. circuit court. Filed Jan. 23, 1891. John A. Shields, clerk.

8 The President of the United States to Hon. John A. Shields, United States commissioner for the southern district of [SEAL.] New York, Greeting:

We command you to return and certify to this court the bench warrant, indictments, and other papers and proceedings relating to the cause of the detention of Edward H. Horner, who, it is claimed, — restrained of his liberty by the United States marshal for the southern district of New York, and that you make such return at a stated term of the circuit court of the United States for said southern district of New York, to be held at the post-office building in the city of New York, on January 23rd, 1891, at 2.30 p. m. of that day, and hereof fail not at your peril.

Witness Hon. Melville W. Fuller, Chief Justice of the United States.

January 23d, 1891.

JOHN A. SHIELDS, *Clerk.*

ALFRED TAYLOR,
HERMAN AARON,
Pet'r's' Att'ys, 15 Wall St., N. Y. City.

Endorsed: U. S. circuit court, so. dist. of N. Y. In the matter of Edward H. Horner. Original writ of certiorari. Alfred Taylor, Herman Aaron, pet'r's att'ys, 15 Wall St., N. Y. city.

9 THE UNITED STATES
vs.
EDWARD H. HORNER.

To the circuit court of the United States for the southern district of New York:

I, John A. Shields, United States commissioner for the southern district of New York, in obedience to the foregoing writ of certiorari, do hereby certify that the papers hereunto annexed and returned herewith contain the record of the proceedings had before me in the above-entitled matter.

New York, January 23d, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

10 SOUTHERN DISTRICT OF NEW YORK, *ss:*

George M. Fleming, being duly sworn, deposes and says that he is a post-office inspector, resident at Chicago, Illinois, and upon information and belief that heretofore and on or about the 29th day of December, 1890, one Edward H. Horner did unlawfully and knowingly deposit and cause to be deposited in the post office at New York, in the State of New York, a certain circular containing a list of prizes awarded at the drawing of a lottery, which said circular was then and there numbered 538 and purported to be issued from the banking-house of E. H. Horner, at 88 Wall street, and was dated at New York, December 27, A. D. 1890, and was then and there addressed to Mrs. M. Schuchman, 624 Illinois St., Belleville, Ill., in said district, and was then and there carried by mail for delivery to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, Illinois, in the southern district of Illinois, according to the said direction thereon.

This deponent further says that the sources of his information and the grounds of his belief are derived from a certified copy of an indictment filed on the 13th day of January, 1891, in the district court of the United States for the southern district of New York, and from a bench warrant issued upon said indictment, and the copies of said papers are hereto annexed.

And this deponent further says that the said Edward H. Horner cannot be found in the said southern district of Illinois, but
11 is now within the southern district of New York.

G. M. FLEMING.

Subscribed and sworn to before me this 15th day of January, 1891.

JOHN A. SHIELDS,
U. S. Com'r.

12 Circuit Court of the United States of America, Southern District of Illinois, *ss:*

THE UNITED STATES OF AMERICA:

To the marshal of the southern district of New York, Greeting:

We command you that you take Edward H. Horner, if he be found in your district, and him safely keep, so that you have his body before our judge of our district court of the United States for the southern district of Illinois at the term thereof now being holden at Springfield, in the district aforesaid, forthwith to answer unto the United States of America in one indictment for "causing lottery publications to be delivered by mail" and in -other indictment for "causing lottery circulars to be deposited in mail," and in five other indictments for "mailing lottery circulars;" and have you then and there this writ.

Witness the Hon. Wm. J. Allen, judge of our said court, at Springfield aforesaid, this 13th day of January, in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the one hundred and fifteenth.

[SEAL.]

M. B. CONVERSE, *Clerk.*

Endorsed: 6668. District court United States, southern district of Illinois. The United States *vs.* Edward H. Horner.

13 UNITED STATES OF AMERICA, }
Southern District of Illinois, } *ss:*

Of the January term of the district court of the United States of America within and for the southern district of Illinois, in the year of our Lord one thousand eight hundred and ninety-one.

The grand jurors of the United States of America chosen, selected, and sworn within and for the southern district of Illinois, in the name and by the authority of the United States of America, upon their oaths do find and present that one Edward H. Horner, late of the district aforesaid, heretofore, to wit, on the 28 day of December, in the year of our Lord one thousand eight hundred and ninety, and within said southern district of Illinois, unlawfully did then and there, on the day and year aforesaid, knowingly deposit and cause to be deposited in the post office at New York, in the State of New York, a certain circular containing a list of prizes awarded at the drawing of a lottery, which said circular was then and there numbered 538 and purported to be issued from the banking-house of E. H. Horner, at 88 Wall street, and was dated at New York, December 27, A. D. 1890, and was then and there addressed to Mrs. M. Schuchman, 624 Illinois St., Belleville, Ill., in said district, and was then and there carried by mail for delivery to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, Illinois, in said district, according to the said direction thereon, contrary to the form of the statute
14 in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States aforesaid, do further find and present that Edward H. Horner, late of the district aforesaid, heretofore, to wit, on the 30th day of December, in the year of our Lord one thousand eight hundred and ninety, and within said southern district of Illinois, unlawfully and knowingly did then and there, on the day and year aforesaid, deposit and cause to be deposited in the post office at New York, in the State of New York, a certain circular containing a list of prizes awarded at the drawing of a lottery in Italian Barletter gold premium bonds of 1870, at Barletta, in the Kingdom of Italy, on the 20th day of November, A. D. 1890; and a list of prizes at the drawing of a lottery in two and a half per cent. city of Antwerp bonds of 1887, at Antwerp, in the Kingdom of Belgium, on the 10th day of November, A. D. 1890; and a list of prizes awarded at the drawing of a lottery in Windischgrætz premium bonds, on the 1st day of December, A. D. 1890; and a list of prizes awarded at the drawing of a lottery in Austrian States bonds of 1864, at Wien, in the Kingdom of Austria, on the 1st day of December, A. D. 1890; and a list of prizes awarded at the drawing of a lottery in three per cent. credit foncier Egyptian bonds of 1886, on November 15, 1890; and a list of prizes awarded at the drawing of a lottery in three per cent.

Servian government bonds of 1881, at Belgrade, in the Kingdom of Servia, on the 14th day of November, A. D. 1890; and a
15 list of prizes awarded at the drawing of a lottery in Holland white cross bonds at Amsterdam, in the Kingdom of Holland, on the 1st day of December, A. D. 1890; which said circular was then and there enclosed in a sealed envelope, duly stamped with postage stamps for the amount of postage required thereon by law, and was then and there addressed upon the outside of said envelope to Mrs. M. Schuchman, 624 Illinois St., Belleville, Illinois, in said district, and was then and there, after being so deposited in the post office as aforesaid, carried by mail for delivery to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, Illinois, in said district, according to the direction thereon—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States aforesaid, do further find and present that Edward H. Horner, late of the district aforesaid, heretofore, to wit, on the 28th day of December, in the year of our Lord one thousand eight hundred and ninety, and within said southern district of Illinois, unlawfully and knowingly did then and there, on the day and year aforesaid, deposit and cause to be deposited in the post office at New York, in the State of New York, a certain circular containing a list of prizes awarded at the drawing of a lottery at Barletta, in the Kingdom of Italy, on the 29th day of November, A. D. 1890, which said circular was then
16 and there addressed to Mrs. M. Schuchman, 624 Illinois St., Belleville, Ill., in said district, and was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois street, in the State of Illinois and in said district, according to the direction on said circular when it was so deposited in the post office at New York by said Edward H. Horner as aforesaid—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oath- aforesaid, in the name and by the authority of the United States aforesaid, do further find and present that the said Edward H. Horner, late of the district aforesaid, heretofore, to wit, on the 29th day of December, in the year of our Lord one thousand eight hundred and ninety, and within the said southern district of Illinois, unlawfully and knowingly did then and there, on the day and year aforesaid, deposit and cause to be deposited in the post office at New York, in the State of New York, a certain printed publication having a caption of the tenor following, viz., "banking-house of E. H. Horner, No. 88 Wall street," bearing date at New York on the 27th day of December, A. D. 1890, and numbered 538, containing a list of prizes awarded at the drawing of a lottery; which said publication was then and there enclosed in a sealed *i*nvelope, duly stamped with postage stamps, and was addressed to Mrs. M. Schuchman, 624 Illi-

nois St., Belleville, Ill., in said district, and was then and
17 there carried by mail; after being so deposited as aforesaid, for delivery to Mrs. M. Schuchman, 624 Illinois street, Belleville, Illinois, in said district, according to said direction thereon, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States aforesaid, do further find and present that Edward H. Horner, late of the district aforesaid, heretofore, to wit, on the 31st day of December, in the year of our Lord one thousand eight hundred and ninety, and within said southern district of Illinois, unlawfully and did then and there, on the day and year aforesaid, knowingly cause to be delivered by mail to Mrs. M. Schuchman, 624 Illinois St., at Belleville, in the State of Illinois, and in said district, a certain circular containing a list of prizes awarded at the drawing of a lottery in two and a half per cent. city of Antwerp bonds of 1887, at Antwerp, on the 10th day of November, A. D. 1890; which said circular was then and there numbered 538 and had a caption printed thereon in substance as follows, viz., "banking-house of E. H. Horner, No. 88 Wall Street," and was dated of the 27th day of December, A. D. 1890; which said circular he, the said Edward H. Horner, theretofore, to wit, on the 29th day of December, A. D. 1890, did knowingly deposit and cause to be deposited in the post office at New York, in the State of New York, addressed to said Mrs. M.
18 Schuchman, at 624 Illinois St., in Belleville, in the State of Illinois, and which said circular was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois street, at Belleville, in the State of Illinois, according to said direction so upon said circular as aforesaid—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JAMES A. CONNALLY,
U. S. District Attorney.

Endorsed: No. 6675. District court United States, southern district of Illinois. The United States *vs.* Edward H. Horner. Indictment. Mailing lottery circulars. A true bill. A. C. Davis, foreman. Filed January 13, A. D. 1891. M. B. Converse, clerk. James A. Connolly, U. S. att'y.

19 UNITED STATES OF AMERICA, }
Southern District of Illinois. }

I, M. B. Converse, clerk of the district court of the United States for the southern district of Illinois, do hereby certify the foregoing to be a true copy of an indictment now pending in said court against Edward H. Horner as the same now appears of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the

[SEAL.] seal of this court, at my office, in Springfield, in said district, this 13th day of January, A. D. 1891.

M. B. CONVERSE.

Endorsed: U. S. circuit court. Filed Jan. 23, 1891. John A. Shields, clerk.

20 The President of the United States of America to the marshal of the United States for the southern district of New York and to his deputies or any or either of them:

Whereas complaint on oath, together with a certified copy of an indictment found in the district court of the United States for the southern district of Illinois, together with a bench warrant, has been filed with me charging that Edward H. Horner did, on or about the 29th day of December, in the year one thousand eight hundred and ninety, at the southern district of New York, to wit, at New York city, unlawfully and knowingly deposited and caused to be deposited in the post office at New York, in the State of New York, a certain circular containing a list of prizes awarded at the drawing of a lottery, which said circular was then and there numbered 538 and purported to be issued from the banking-house of E. H. Horner at 88 Wall street, and was dated at New York, December 27th, A. D. 1890, and was then and there addressed to Mrs. M. Schuchman, 624 Illinois St., Belleville, Ill., in said southern district of Illinois, and was then and there carried by mail for delivery to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, Illinois, in the southern district of Illinois, according to the directions thereon, and with various offences stated in said indictment, contrary to the statutes of the United States in such case made and provided; and

21 whereas it has been satisfactorily proven to me that said Edward H. Horner is now within the southern district of New York:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Edward H. Horner and bring his body forthwith before me or some judge or justice of the United States, wherever in the State of New York he may be found, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 15th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

EDWARD MITCHELL,
[SEAL.] *United States Attorney.*

The within-named prisoner being arrested and brought before me on the within warrant and the within charge being explained and the said accused demanding an examination respecting said charge, I hereby commit him to the custody of the U. S. marshal, to be

brought before me on the 17th day of January, 1891, at 11 o'clock a. m., for such examination in default of $5,000 bail.

New York, Jan'y 15, 1891.

JOHN A. SHIELDS,
U. S. Commissioner.

To John W. Jacobus, U. S. marshal, S. D. N. Y.

H. O. G. H. B.

22 Defendant discharged on bail to await examination before me, January 17th, 1891, at 11 o'clock.

New York, Jan'y 15th, 1891.

JOHN A. SHIELDS,
U. S. Com'r.

G. H. B. H. O.

Def't discharged on bail to await decision of Judge Brown.

Jan'y 17th, 1891.

JOHN A. SHIELDS,
U. S. Com'r.

H. O. G. H. B.

The within-named defendant, Edward H. Horner, being brought before me this day on the within warrant for examination, and it appearing to me from the testimony offered that he is the person charged in the within warrant, and that there is probable cause to believe the said Edward H. Horner guilty of the offences charged herein, the said Edward H. Horner is hereby committed for trial at the southern district of Illinois, the district in which the offences are alleged to have been committed, and the said Edward H. Horner is hereby committed to the custody of the U. S. marshal for the southern district of New York until a warrant for his removal shall issue by the U. S. district judge for the southern district of New York, or he shall be otherwise dealt with according to law.

New York, Jan'y 17th, 1891.

JOHN A. SHIELDS,
U. S. Comm'r.

23 Endorsed: U. S. circuit court. The United States of America *vs.* Edward H. Horner. Warrant to apprehend. Edward Mitchell, United States attorney. I hereby depute H. Osborne & Brockmeyer to execute the within process. Dated New York, January 15, 1891. John W. Jacobus, U. S. marshal. U. S. circuit court. Filed Jan. 23, 1891. John A. Shields, clerk.

24 THE UNITED STATES
vs.
EDWARD H. HORNER.

NEW YORK, *January 17th*, 1891.

Present: Edward Mitchell, Esq., U. S. attorney, and Maxwell Evarts, Esq., assistant U. S. attorney, on behalf of the United States;

and Alfred Taylor, Esq., and Hermann Aaron, Esq., on behalf of the accused, and the accused, Edward H. Horner.

The United States attorney offers in evidence a certified copy of an indictment found in the district court of the United States for the southern district of Illinois, charging Edward H. Horner with unlawfully and knowingly depositing and causing to be deposited in the post office at New York, in the State of New York, a certain circular containing a list of prizes awarded at the drawing of a lottery, &c., and a bench warrant issued on the same.

WILLIAM CONNARD, sworn, says:

I am a post-office inspector of the United States; my residence is Rockwell, Maryland; I know the defendant in this case.

Q. Do you know this man, Edward H. Horner, to be the man charged in the indictment and bench warrant, a certified copy of whith I have offered in evidence?

25 Objected to on the ground that it calls for a conclusion by the witness and by a determination by the witness of the very question which the commissioner must decide upon. Overruled. Exception.

A. I do.

Cross-examined:

I first saw Horner about the latter part of November, 1890, at his office, No. 88 Wall street, New York city. Previous to that time I had no personal acquaintance with him. Since that time I have seen defendant three or four times, and always in the city of New York. I never saw him in the State of Illinois, or knew him as a resident of the State of Illinois. So far as I personally know, defendant has always been a resident of the city of New York, and all that I now know is that the person now in custody is Edward H. Horner, of the city of New York.

Redirect:

On the 30th of January, 1891, I met Mr. Horner at his place of business, 88 Wall street, New York city, upon which occasion he informed me in regard to his business and stated that he had agencies in various parts of the country conducted under his name, among them the city of Chicago.

GEORGE M. FLEMING, being duly sworn, deposes and says as follows:

I have heard the testimony of the last witness and I testify to the same facts.

26 Defendant committed to the custody of the U. S. marshal for the southern district of New York to await a warrant of removal by the U. S. district judge for the southern district of New York or be otherwise dealt with according to law.

JOHN A. SHIELDS,
U. S. Commissioner.

Endorsed: U. S. circuit court. Filed Jan. 23, 1891. John A. Shields, clerk.

27 United States District Court, Southern District of New York.

UNITED STATES
vs.
EDWARD H. HORNER.

Edward Mitchell, U. S. att'y; Maxwell Evarts, ass't U. S. att'y; Alfred Taylor and Herman Aaron, for defendant.

BROWN, *J.:*

The defendant having been arrested in this city and held by a United States commissioner upon a charge of violating the statutes forbidding the use of the mails in the lottery business, application is made to me, under section 1014 of the Revised Stat-es, for his removal to the southern district of Illinois for trial under the indictment there found against him for such offenses. Objection to his removal is made on the ground that no offense is charged in the indictment, or, if any, none that is legally triable in that State; that if any offense is charged in the indictment it is an offense consisting wholly of acts committed in the State of New York, and cannot, therefore, under the sixth amendment of the United States Constitution, be tried in the State of Illinois, but only in this district, wherein the offense was committed. I have no doubt that upon such objections it is not only the right but the duty of the
28 court, before the removal of the accused to a distant forum for trial, to look into the indictment so far as to see whether an offense against the United States is charged, and whether it is such an offense as may be lawfully tried in the for-m to which it is claimed the accused should be removed. *In re* Dana, 7 Ben., 1; *In re* Buell, 3 Dillon, 116, 120.

On examining the indictment I have no doubt that each of the five counts charges an offense against the United States in at least general terms. Any defects of form or objections that might be raised on special demurrer are not proper to be considered here. All the counts are founded upon the act of Congress approved Sept. 19, 1890, which amends section 3894 of the U. S. Revised Statutes, so as to prohibit the carrying or delivery by mail of "any letter, postal card, or circular concerning any lottery or list of the drawings of any lottery," and then says:

"Any person who shall knowingly deposit or cause to be deposited or who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of this section or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year or by both such fine and imprisonment for each offense.

Any person violating any of the provisions of this section
29 may be proceeded against by information or indictment and tried and punished either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon or at which it is caused to be delivered by mail to the person to whom it is addressed."

These provisions create three somewhat different offenses: (1) knowingly depositing or causing to be deposited such forbidden matter in the mails; (2) sending such matter or causing it to be sent by mail; (3) knowingly causing such matter to be delivered by mail. All the counts, I think, describe the matter mailed sufficiently for the purpose of this application as prohibited matter within the statute. The first four counts are based entirely upon the first of the above three offenses, namely, knowingly "depositing or causing to be deposited" such prohibited matter in the mails at New York. The fifth and last count charges the third offense, namely, that within the said southern district of Illinois the defendant, on the 31st of December, 1890, unlawfully did knowingly "cause to be delivered by mail" to the person therein named at Belleville, Ill., a prohibited circular, describing it, which, it is alleged, the defendant, on Dec. 29th, 1890, did knowingly deposit and cause to be deposited in New York post office, addressed to her as above stated, and which circular was then and there carried by mail for delivery to her.

The first and second offenses do not require for their com-
30 pletion that the matter deposited in the mails for transmission should be in fact transmitted or delivered. All that is required to constitute those offenses is that the prohibited matter should be "knowingly deposited" or "caused to be deposited" in the mails or "knowingly sent or caused to be sent" to the mails for the purpose of transmission; and if those offenses are completed at the place where the prohibited matter is deposited or sent for deposit in the mails, whether the matter be transmitted or not, it may be that, under the constitutional provision invoked, no trial for those particular offenses could be had in any other district.

It is not necessary, however, to consider further those two clauses of the statute or the first four counts of the indictment, for I have no doubt that the last count charges an offense which is not, and cannot be, completed without the delivery of the matter by mail to the person to whom it is addressed. This offense consists under the third clause of the act in "knowingly causing such prohibited matter to be delivered by mail." It is competent for the law-making power to protect the citizen from the demoralizing or corrupting influences of printed or written matter circulated through the mails by making criminal any such intentional delivery. That is precisely the ultimate object of the act in question, just as the ultimate object of the punishment for murder is the protection of human life. In

cases of murder it is well settled that a person who within one
31 territorial jurisdiction commits murder upon a person within another territorial jurisdiction, as, for instance, by firing a pistol ball across the boundary line between two States, may be tried

and convicted in the jurisdiction where the crime is completed by the death of the victim. The voluntary act of firing is in one jurisdiction, it takes effect in another. Without death there is no murder. The crime is consummated in the jurisdiction where the death occurs, and is consequently committed there, and may be tried there, although it may also be tried at the place of shooting (Rev. St., sec. 731). So under the last count in the present case, though the voluntary act began in New York by deposit in the mails, the third offense, viz., "causing the delivery by mail," could not be consummated except by delivery to the person and at the place intended. In whatever way the accused may have caused such delivery to be made, either by deposit in the mails in New York or elsewhere, and wherever his voluntary act may have begun, this third offense is not committed until the delivery by mail is made; and when such delivery is made the offense is committed and committed at the place where the delivery is made in accordance with the intent of the accused and by his procurement, though it may perhaps also be deemed committed at the place of deposit.

The offense stated in the last count is therefore triable in Illinois under the provisions of the U. S. Constitution, as well as of section 731 and 3894 of the Revised Statutes as amended. *In re*
32 Palliser, 136 U. S., 257.

However inconvenient it may be to the accused to be removed to a distant tribunal for trial, one who voluntarily makes use of the long arm of the United States mails to inflict an injury at a distant place has no just reason to complain of being held to answer within the jurisdiction that he has chosen as his field of operations.

The order for removal is granted.

Jan. 23, 1891.

[SEAL.] A. B.

A true copy.

SAM'L H. LYMAN, *Clerk.*

(Endorsed:) United States *v.* Horner. Opinion of Brown, J. Filed Jan. 23, 1891.

33 The President of the United States of America to the marshal of the United States for the southern district of New York and to his deputies or any or either of them:

Whereas one Edward H. Horner has been arrested and imprisoned in this district by John A. Shields, a commissioner of the circuit court for the southern district of New York, for offenses alleged to have been committed in another district—that is to say, for having, on the 29th day of December, in the year one thousand eight hundred and ninety, at the southern district of New York, unlawfully and knowingly deposited and caused to be deposited in the post office in New York a certain circular containing a list of prizes awarded at the drawing of a lottery, which said circular was then and there numbered five hundred and thirty-eight, and for having, on the 31st day of December, in the year of our Lord one thou-

sand eight hundred and ninety, and within said southern district of Illinois, unlawfully and knowingly caused to be delivered by mail to Mrs. M. Schuchman, 624 Illinois street, at Belleville, in the State of Illinois, and in said district, a certain circular containing a list of prizes awarded at the drawing of a lottery in two and a half per cent. city of Antwerp bonds of 1887, at Antwerp, on the 10th day of November, A. D. 1890, which said circular was then and there numbered 538 and had a caption printed thereon in substance
34 as follows, viz., "banking-house of E. H. Horner, No. 88 Wall street," and was dated on the 27th day of December, A. D. 1890, which said circular he, the said Edward H. Horner, theretofore, to wit, on the 29th day of December, A. D. 1890, did knowingly deposit and cause to be deposited in the post office at New York, in the State of New York, addressed to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, in the State of Illinois, and which said circular was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois street, at Belleville, in the State of Illinois, according to said direction so upon said circular as aforesaid, as by reference to the certified copy of the indictment, the copies of the original warrant of arrest, and the commitment endorsed thereupon, which are hereto attached, will more fully and at large appear; and

Whereas the said southern district of Illinois is that in which trial of the said offense is to be had, and the United States attorney of this district having applied to me for a warrant of removal under the provisions of section 1014 of the Revised Statutes of the United States:

Now, therefore, you are hereby commanded in the name of the President of the United States of America to remove the said Edward H. Horner forthwith to the southern district of Illinois, to be tried in said district upon such counts in the indictment now pend-
35 ing in said district as the said Edward H. Horner can be legally tried upon, and to safely deliver him to the marshal of the said district or to such person as shall be by the said marshal deputized to receive him.

Given under my hand this 23d day of January, in the year one thousand eight hundred and ninety-one.

ADDISON BROWN,
United States District Judge, Southern District of New York.

Attest:
[SEAL.] SAM'L H. LYMAN, *Clerk.*

(Endorsed:) United States circuit court. The United States of America *vs.* Edward H. Horner. Warrant of removal. Edward Mitchell, United States attorney.

36 At a stated term of the circuit court of the United States for the southern district of New York held in the post-office building, in the city, county, and State of New York, on January 23d, 1891.

Present: Honorable E. Henry Lacombe, circuit judge.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

Upon reading and filing the petition of Edward H. Horner, verified January 23d, 1891, and the writs of *habeas corpus* and certiorari thereupon issued, directed to Honorable John W. Jacobus, marshal of the United States for the southern district of New York, and Honorable John A. Shields, United States commissioner, and returns of said writs made by the said marshal and said commissioner:

Now, after hearing Alfred Taylor, Esquire, and Herman Aaron, Esquire, counsel for said Edward H. Horner, in support of an application for the discharge of said Horner from custody, the said Horner having been produced before this court by said marshal in obedience to said writ of *habeas corpus*, and after hearing Maxwell Evarts, Esquire, assistant United States attorney, in opposition to said application and in support of an application to remand said
37 Horner to custody, and due deliberation having been had—

It is ordered that said writ of *habeas corpus* be dismissed and that said Horner be, and he hereby is, remanded to the custody of the said John W. Jacobus, marshal of the United States for the southern district of New York.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court, so. dist. of N. Y. In the matter of the application of Edward H. Horner for a writ of *habeas corpus.* Order dismissing writ. Alfred Taylor, Herman Aaron, attorneys for E. H. Horner, pet'r, 15 Wall street, New York. U. S. circuit court. Filed Jan. 23, 1891. John A. Shields, clerk.

38 U. S. Circuit Court.

In the Matter of the Application of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

On the application of Edward H. Horner therefor, and after hearing Herman Aaron in favor, and after hearing Maxwell Evarts, Esq., assistant United States district attorney—

Ordered that pending the appeal to the Supreme Court by Edward H. Horner herein he be, and he hereby is, remanded to the custody of the marshal for the southern district of New York, and that he be released on bail by said marshal upon giving bail in the sum of twenty-five hundred dollars to obey the mandate or direction of the court upon the entry of judgment upon the decision by the Supreme Court of the said appeal.

N. Y., Feb'y 3rd, 1891.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court. *In re* application of Edward H. Horner for writ of *habeas corpus.* Order for custody pending appeal. Alfred Taylor, Herman Aaron, att'ys for E. H. Horner, 15 Wall St. U. S. circuit court. Filed Feb. 3, 1891. John A. Shields, clerk.

39 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Be it remembered that on this 3rd day of February, in the year of our Lord one thousand eight hundred and ninety-one, before me, John A. Shields, a clerk of the circuit court of the United States for the southern district of New York, personally came Edward H. Horner and Moses Mehrback and severally acknowledged themselves to owe to the United States of America—that is to say, the said Edward H. Horner the sum of two thousand five hundred dollars and the said Moses Mehrback the sum of two thousand five hundred dollars, separately to be levied and made of their respective goods and chattels, lands and tenements, to the use of the said United States if default should be made, in the condition following, to wit:

Whereas, on the 23rd day of January, 1891, a warrant of removal was issued by the Honorable Addison Brown, district judge of the district court of the United States for the southern district of New York, directed to the marshal of the United States for the said southern district of New York and commanding him to remove the said Edward H. Horner forthwith to the southern district of Illinois, to be tried in said district upon such grounds in the indictment pending against him in said district as the said Edward H. Horner could be legally tried upon; and

Whereas, to wit, on the said 23rd day of January, 1891,
40 the said Edward H. Horner filed a petition in the circuit court of said district for a writ of *habeas corpus* to release him from the custody of the said marshal, which said writ was issued by the said circuit court on the said 23rd day of January, 1891; that afterwards and upon the said 23rd day of January, 1891, the said circuit court, having considered said petition and the return of the marshal thereon setting forth the cause of the detention of said Edward H. Horner, did order and direct that said writ so issued be discharged, and that said Edward H. Horner be remanded to the custody of the said marshal, from which order said Edward H. Horner then and there prayed an appeal to the Supreme Court of the United States, and also then and there applied to be admitted upon recognizance until the determination of said appeal by said Supreme Court; which said motion for appeal and order to be admitted to bail was then and there allowed upon said Edward H. Horner entering into a recognizance with the United States in the sum of two thousand five hundred dollars, with sufficient surety, conditioned as herein:

Now, therefore, the condition of this recognizance is such that if, upon the judgment of the Supreme Court upon said appeal from the final decision of said circuit court discharging said writ of *habeas corpus* as aforesaid, the said Edward H. Horner shall personally appear before said circuit court whenever and as soon as a judgment upon the mandate of the said Supreme Court shall be entered
41 in said circuit court, and then and there surrender himself to the said marshal and abide the order of the said circuit

and supreme courts, then this recognizance will be void; otherwise to remain in full force and virtue.

EDW. H. HORNER. [SEAL.]
MOSES MEHRBACK. [SEAL.]

Acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Moses Mehrback, of No. —, in the city of New York, being duly sworn, deposes and says that he is worth the sum of five thousand dollars over and above all his just debts and liabilities.

MOSES MEHRBACK.

Sworn to this 3rd day of February, A. D. 1891, before me—

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

Endorsed: U. S. circuit court, southern district of New York. The United States *vs.* Edward H. Horner. Recognizance. U. S. circuit court. Filed Feb. 3, 1891. John A. Shields, clerk.

42 At a stated term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city, county, and State of New York, on the 3rd day of February, 1891.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

Upon all the proceedings herein, in accordance with section 765 of the Revised Statutes of the United States, it is—

Ordered that a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings herein be sent up to the Supreme Court of the United States by the clerk of this court on or before the 4th day of March, 1891, and that said day —, and the same hereby is, made the return day of the appeal allowed herein.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court, so. dist. of N. Y. In the matter of the application of Edward H. Horner for a writ of *habeas corpus.* Order regulating return. Alfred Taylor, att'y for pet'r, 15 Wall St., New York. U. S. circuit court. Filed Feb. 3, 1891. John A. Shields, clerk.

43 *Bond for Damages & Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

In the Matter of the Application of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

Know all men by these presents that we, Edward H. Horner, residing at No. 124 East 85th street, New York city, and Moses Mehrback, residing at No. 134 East 79th street, New York city, are held and firmly bound unto the United States of America and to John W. Jacobus, individually and as marshal of the United States for the southern district of New York, in the sum of five hundred dollars, to be paid to the said United States of America and to John W. Jacobus, individually and as marshal of the United States for the southern district of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 3d day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Edward H. Horner has prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered in the above-entitled suit by the judge of the
44 circuit court of the United States for the southern district of New York, entered on January 23d, 1891:

Now, therefore, the condition of this obligation is such that if the above-named Edward H. Horner shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDW. H. HORNER. [SEAL.]
MOSES MEHRBACK. [SEAL.]

Sealed and delivered and taken and acknowledged this 3d day of Feb'y, 1891, before me—

JOHN A. SHIELDS,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Moses Mehrback, being duly sworn, doth depose and say he resides at No. 134 East 79th street, in the city of New York, in said district; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

MOSES MEHRBACK.

Sworn to this 3d day of Feb'y, A. D. 1891, before me—

JOHN A. SHIELDS,
U. S. Comm'r.

Endorsed: U. S. circuit court, southern district of New York. In the matter of the application of Edward H. Horner. Bond for damages and costs on appeal. Alfred Taylor, att'y for appellant, 15 Wall St. Approved. E. Henry Lacombe. U. S. circuit court. Filed Feb. 3, 1891. John A. Shields, clerk.

45 STATE OF NEW YORK, } ss:
City and County of New York, }

Michael J. Conroy, being duly sworn, says that he is of the age of twenty years; that on February 6th, 1891, between 3 p. m. and 4 p. m., he served the annexed appeal on Edward Mitchell, Esq., district attorney of the United States for the southern district of New York, by delivering to and leaving with a person in charge of the office of said attorney, at the post-office building, in the city of New York, a true copy thereof, the said attorney being at the time of the said service absent from the said office; and on February 6th, 1891, between 3 p. m. and 4 p. m., he served a copy of saida nnexed appeal on John W. Jacobus, Esq., marshal of the United States for the southern district of New York, by delivering to and leaving with the said John W. Jacobus a true copy thereof at his office, in the post-office building, in the city of New York.

M. J. CONROY.

Sworn to before me this 6th day of February, 1891.

EDMOND C. BROWN,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed N. Y. Co.

46 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of EDWARD H. HORNER for the Writ of *Habeas Corpus.*

The above-named petitioner, Edward H. Horner, conceiving himself aggrieved by the order entered January 23d, 1891, in the above-entitled proceeding, doth hereby appeal from the said order to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

New York, January 23d, 1891.

ALFRED TAYLOR,
Attorney for Petitioner and Appellant, Edward H. Horner,
15 *Wall Street, New York City.*

And now, to wit, on the 23d day of Jan'y, 1891, it is ordered that appeal be allowed as prayed for.

E. HENRY LACOMBE.

Endorsed: Circuit court of the United States for the southern district of New York. In the matter of the petition of Edward H.

Horner for the writ of *habeas corpus*. Appeal. Alfred Taylor, attorney for petitioner and appellant, Edward H. Horner, 15 Wall street, New York city. Service of a copy of within appeal is admitted. N. Y., Feb'y 6, 1891. Edward Mitchell, U. S. att'y. U. S. circuit court. Filed Feb. 7, 1891. John A. Shields, clerk.

47 STATE OF NEW YORK, } ss.:
City and County of New York, }

Michael J. Conroy, being duly sworn, says that he is of the age of twenty years; that on February 6th, 1891, between 3 p. m. and 4 p. m., he served the annexed assignment of errors on Edward Mitchell, Esq., district attorney of the United States for the southern district of New York, by delivering to and leaving with a person in charge of the office of said attorney, at the post-office building, in the city of New York, a true copy thereof, the said attorney being at the time of the said service absent from the said office; and on February 6th, 1891, between 3 p. m. and 4 p. m., he served a copy of said annexed assignment of errors on John W. Jacobus, Esq., marshal of the United States for the southern district of New York, by delivering to and leaving with the said John W. Jacobus a true copy thereof at his office, in the post-office building, in the city of New York.

M. J. CONROY.

Sworn to before me this 6th day of February, 1891.
[SEAL.] EDMOND C. BROWN,
Notary Public, Kings Co.

Cert. filed N. Y. Co.

48 The Supreme Court of the United States.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus*.

Afterwards, to wit, on the fourth day of March, one thousand eight hundred and ninety-one, at the October term for one thousand eight hundred and ninety of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Edward H. Horner, by Alfred Taylor, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

I.

That the matters charged in the indictment against Edward H. Horner do not constitute a crime by the common law or under any statute of the United States.

II.

That the matters charged in the first count of the indictment do not constitute a crime by the common law or under any of the statutes of the United States.

III.

That the matters charged in the second count of the indictment do not constitute a crime by the common law or under any of the statutes of the United States.

IV.

That the matters charged in the third count of the indict-
49 ment do not constitute a crime by the common law or under any of the statutes of the United States.

V.

That the matters alleged in the fourth count of the indictment do not constitute a crime by the common law or under any of the statutes of the United States.

VI.

That the matters alleged in the fifth count of the indictment do not constitute a crime by the common law or under any of the statutes of the United States.

VII.

That the alleged offense set forth in the first count of said indictment was committed, if at all, within the southern district of New York and not within the southern district of Illinois, and that by article third, section 2d, of the Constitution of the United States and by the 6th amendment to the Constitution of the United States the said Horner cannot be tried upon the said charges in the said district of Illinois, and the attempted removal of said Horner to said district for trial upon or under the indictment containing such count is unlawful and a violation of his constitutional rights.

VIII.

That the alleged offense set forth in the second count of the indictment was committed, if at all, within the southern district of New York and not within the southern district of Illinois, and that by article third, section 2d, of the Constitution of the United
50 States the said Horner cannot be tried upon the said charges in the said district of Illinois, and the attempted removal of said Horner to said district for trial upon or under the indictment containing such count is unlawful and a violation of his constitutional rights.

IX.

That the alleged offense set forth in the third count of the indictment was committed, if at all, within the southern district of New York and not within the southern district of Illinois, and that by article third, section 2d, of the Constitution of the United States the said Horner cannot be tried upon the said charges in the said district of Illinois, and the attempted removal of said Horner to

said district for trial is unlawful and a violation of his constitutional right-.

X.

That the alleged offense set forth in the fourth count of the indictment was committed, if at all, within the southern district of New York and not within the southern district of Illinois, and that by *the* article third, section 2d, of the Constitution of the United States the said Horner cannot be tried upon the said charges in the said district of Illinois, and the attempted removal of said Horner to said district for trial upon or under the indictment containing such count is unlawful and a violation of his constitutional rights.

XI.

That the alleged offense set forth in the fifth count of the
51 indictment was committed, if at all, within the southern district of New York and not within the southern district of Illinois, and that by article third, section 2d, of the Constitution of the United States the said Horner cannot be tried upon the said charges in the district of Illinois, and the attempted removal of said Horner to said district for trial upon or under the indictment containing such count is unlawful and a violation of his constitutional rights.

XII.

That the warrant for removal of said Horner "to be tried in said district upon such counts in the indictment now pending in said district as the said Edward H. Horner can be legally tried upon" is indefinite, uncertain, and not specific and does not apprise the said Horner of the charges or alleged offenses for which he is to be tried or inform him of the nature and cause of the accusation against him and is a violation of his legal right to be apprised thereof and a violation of the 6th amendment of the Constitution of the United States, which gives said Horner the right to be informed of the nature and cause of the accusation against him.

XIII.

That the said warrant of removal directs the removal of the said Horner for trial to the State of Illinois, in the southern district of Illinois, from the southern district of New York, under an indictment some of the offenses set forth wherein are not triable in the
said district last aforesaid to which the removal is directed,
52 and such a removal is a violation of the said Horner's legal and constitutional rights.

XIV.

That none of the counts in said indictment set forth the alleged circular therein mentioned or a copy thereof or facts showing the contents thereof, and the same are, and each of them is, insufficient in law and do not set forth facts which constitute any offense againt any statute or law.

XV.

That "a certain circular containing a list of prizes awarded at the drawing of a lottery, which said circular was then and there numbered 538 and purported to be issued from the banking-house of E. H. Horner, at 88 Wall street, and was dated at New York, December 27, A. D. 1890," which is mentioned in the first count of said indictment, is not a circular the depositing whereof or causing the depositing whereof or sending or causing the sending whereof or causing the delivery whereof is made an offense under section 3894 of the Revised Statutes of the United States or of any statute of the United States or by the common law.

XVI.

That "a certain circular containing a list of prizes awarded at the drawing of a lottery in Italian Barletta gold premium bonds of 1870, at Barletta, in the Kingdom of Italy, on the 20th day of November, A. D. 1890, and a list of prizes, etc.," mentioned in the second count of the indictment, is not a circular the depositing whereof or causing the depositing whereof or sending or
53 causing the sending whereof or causing the delivery whereof is made an offense under section 3894 of the Revised Statutes of the United States or of any statute of the United States or by the common law.

XVII.

That "a certain circular containing a list of prizes awarded at the drawing of a lottery at Barletta, in the Kingdom of Italy, on the 29th day of November, A. D. 1890," mentioned in the third count of the indictment, is not a circular the depositing whereof or causing the depositing whereof or the sending or causing the sending whereof or the causing the delivery whereof is made an offense under section 3894 of the Revised Statutes of the United States or of any statute of the United States or by the common law.

XVIII.

That "a certain printed publication having a caption of the tenor following, viz., banking-house of E. H. Horner, No. 88 Wall street, bearing date at New York on the 27th day of December, A. D. 1890, and numbered 538, containing a list of prizes awarded at the drawing of a lottery," mentioned in the fourth count of said indictment, is not a publication the depositing or causing of deposit whereof or the sending or causing the sending whereof or the causing the delivery whereof is made an offense under section 3894 of the Revised Statutes of the United States or of any statute of the United States or the common law.

54 XIX.

That "a certain circular containing a list of prizes awarded at the drawing of a lottery in 2½ per cent. city of Antwerp bonds of

1887, at Antwerp, on the 10th day of November, A. D. 1890, which said circular was then and there numbered 538 and had a caption printed thereon in substance as follows, viz., banking-house of E. H. Horner, No. 88 Wall street, and was dated on the 27th day of December, A. D. 1890," is not a circular the depositing or causing the depositing whereof or sending or causing the sending whereof or the causing the delivery whereof is made an offense under section 3894 of the Revised Statutes of the United States or by any statute of the United States or by the common law.

XX.

That the said indictment contains charges or some of them against Edward H. Horner which do not constitute offenses under any of the statutes or laws of the United States, and the warrant for the removal of said Horner for trial under said indictment was unauthorized and unlawful.

XXI.

That the said Edward H. Horner, who was and is restrained of his liberty, is not Edward H. Horner, late of the southern district of Illinois, the person charged in the said indictment.

XXII.

55 The marshal of the United States for the southern district of New York had no authority to arrest said Horner or restrain him of his liberty.

XXIII.

That the circuit court of the United States for the southern district of New York is not discharging the said Edward H. Horner upon the return of the writ of *habeas corpus* herein erred, and erred in dismissing said writ.

Wherefore the said Edward H. Horner prays that the dismissal of said writ and the order of the said circuit court of the United States for the southern district of New York be reversed and the said circuit court of the United States for the southern district of New York be ordered to enter an order directing the discharge of the said Edward H. Horner.

ALFRED TAYLOR,
Attorney for Appellant, 15 *Wall Street, New York City.*

Endorsed: U. S. Supreme Court. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. Assignment of errors. Alfred Taylor, attorney for appellant, 15 Wall street, New York city. Service of a copy of the within assignment of errors is hereby admitted. N. Y., Feb. 6, 1891. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Feb. 7, 1891. John A. Shields, clerk.

56 STATE OF NEW YORK, } ss:
City and County of New York, }

Michael J. Conroy, being duly sworn, says that he is of the age of twenty years; that on February 6th, 1891, between 5 p. m. and 4 p. m., he served the annexed citation on Edward Mitchell, Esq., district attorney of the United States for the southern district of New York, by delivering to and leaving with a person in charge of the office of said attorney, at the post-office building, in the city of New York, a true copy thereof, the said attorney being at the time of the said service absent from the said office; and on February 6th, 1891, between 3 p. m. and 4 p. m., he served a copy of said annexed citation on John W. Jacobus, Esq., marshall of the United States for the southern district of New York, by delivering to and leaving with the said John W. Jacobus a true copy thereof at his office, in the post-office building, in the city of New York.

M. J. CONROY.

Sworn to before me this 6th day of February, 1891.

EDMOND C. BROWN,
[SEAL.] *Notary Public, Kings Co.*

Certif. filed N. Y. Co.

57 UNITED STATES OF AMERICA, ss:

To the United States of America and John W. Jacobus, individually and as marshal of the United States for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth day of March, eighteen hundred and ninety-one, pursuant to an appeal taken, allowed, and filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Edward H. Horner is appellant and the United States of America and John W. Jacobus, individually and as marshal of the United States for the southern district of New York, are respondents, to show cause, if any there be, why the order in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, Feb. 3d, 1891.

E. HENRY LACOMBE.

Endorsed: U. S. Supreme Court. Edward H. Horner, appellant, — The United States and John W. Jacobus, individually and as marshal. Citation. Alfred Taylor, attorney for appellant. Service of a copy of the within citation is hereby admitted this 6th day of Feb'y, 1891. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Feb. 7, 1891. John A. Shields, clerk.

58 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 57, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Edward H. Horner, appellant, against The United States of America and John W. Jacobus, individually and as marshal of the United States for the southern district of New York, respondents, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of February, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 14,509. S. New York C. C. U. S. No. 1051. Edward H. Hornor, appellant, *vs.* The United States and John W. Jacobus, individually and as marshal of the United States for the southern district of New York. Filed February 28, 1891.

(Office Supreme Court U. S.
FILED,
JAN 8 1892
JAMES H. MCKENNEY
CLERK)

CASE No. 14509.

IN THE

Supreme Court of the United States.

Term No. 1051.

EDWARD H. HORNER,

Appellant,

vs.

THE UNITED STATES AND JOHN W. JACOBUS, individually and as Marshal of the United States for the Southern District of New York.

Appeal from the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT.

ALFRED TAYLOR,
FREDERICK S. PARKER,
HERMAN AARON,
Counsel for Appellant,
15 WALL STREET,
New York City.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

EDWARD H. HORNER,
Plaintiff in Error,

vs.

THE UNITED STATES and JOHN W. JACOBUS, individually and as Marshal of the United States, for the Southern District of New York.

No. 1051.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT.

Statement of Case.

This cause comes up upon appeal of Edward H. Horner, a citizen of the State of New York, from

an order made at a Stated Term of the Circuit Court of the United States, for the Southern District of New York, on January 23d, 1891, remanding the said Horner to the custody of the Marshal of the United States for the Southern District of New York.

Edward H. Horner, the appellant, was indicted at the January Term of the District Court of the United States for the Southern District of Illinois, for an alleged violation of the Lottery Act, Section 3894 of the Revised Statutes, as amended by the Act of September 19, 1890.

(Record, pages 6, 7 and 8.)

A bench warrant, directed to the Marshal of the Southern District of New York, was issued by the District Court of Illinois.

(Record, page 5.)

Upon a certified copy of the indictment and the bench warrant, a warrant was issued by a United States Commissioner for the Southern District of New York, and the accused was arrested.

(Record, page 9.)

An examination was held before the Commissioner.

(Record, page 11.)

The indictment describes the accused as Edward H. Horner, late of the Southern District of Illinois.

On the arrest and examination, Edward H. Horner, a resident and citizen of the State of New York, was held by the Commissioner, and committed

to the custody of the Marshal of the United States for the Southern District of New York,

"To await a warrant of removal by the United "States District Judge for the Southern District of "New York, or be otherwise dealt with according "to law."

(Record, page 11.)

Thereupon application was made to the United States District Judge for the Southern District of New York for a warrant of removal under provisions of Section 1014 of the Revised Statutes, and an order was made by said District Judge as follows:

"Now, therefore, you are hereby commanded, in "the name of the President of the United States of "America, to remove the said Edward H. Horner "forthwith to the Southern District of Illinois, *to* "*be tried in said district upon such counts in the* "*indictment now pending in said district as said* "*Edward H. Horner can be legally tried upon;* "and to safely deliver him to the Marshal of said "district, or to such person as shall be by said "Marshal deputized to receive him."

(Record, page 15.)

Upon the granting of such order, the learned Judge filed an opinion.

(Record, pages 12, 13 and 14.)

Thereupon the accused presented to the Circuit Court of the United States for the Southern District of New York, his petition and complaint for writs of *habeas corpus* and *certiorari*.

(Record, pages 1 and 2.)

The Circuit Court at a stated term ordered that writs of *habeas corpus* and *certiorari* issue.

(Record, page 3.)

The writs were issued and due returns made.

(Record, pages 3 and 4.)

At a stated term of the Circuit Court of the United States for the Southern District of New York, upon such return, an order was made dismissing the writs and remanding the accused to the custody of the Marshall of the United States for the Southern District of New York.

(Record, page 16.)

Thereupon, the accused, Edward H. Horner, appealed to this Court from the said order of the stated term of the Circuit Court entered January 23d, 1891, dismissing the writs and remanding him to the custody of the Marshal for removal to the Southern District of Illinois.

(Record, page 20.)

And which appeal was duly allowed.

(Record, page 20.)

Assignment of Errors.

The petitioner alleged that the indictment and bench warrant under which he was held, were unconstitutional without jurisdiction and void.

The appellant assigns as error:

FIRST.—That the matters charged in the indictment do not, nor do the matters charged in each separate count of the indictment or in any of them constitute a crime by the common law or under any of the statutes of the United States.

SECOND.—That the alleged offence set forth in the first count of the indictment was committed, if at all, within the Southern District of New York, and not within the Southern District of Illinois; and by Article 3, section 2, of the Constitution of the United States, and by the sixth amendment, he could not be tried upon the said charges in the said District of Illinois; and his attempted removal to said district for trial upon or under the indictment containing such count, is unlawful and a violation of his constitutional rights.

And separately, that the attempted removal under each and every of the counts of the indictment, is unlawful and a violation of his constitutional rights.

THIRD.—That the warrant for the removal of the appellant "to be tried in said district upon such "counts in the indictment now pending in said "district as the said Edward H. Horner can be le-"gally tried upon," is indefinite, uncertain and not specific; and does not apprise the said Horner of the charges or alleged offences for which he is to be tried; or inform him of the nature or cause of the accusation against him; and is a violation of his legal right to be apprised thereof, and a violation

of the sixth amendment of the Constitution of the United States.

FOURTH.—That the said warrant of removal directs the removal for trial under an indictment, some of the offences set forth wherein are not triable in the district to which the removal is directed.

FIFTH.—That none of the counts of said indictment set forth the alleged circular therein mentioned or a copy thereof, or facts showing the contents thereof, and the same are and each of them is insufficient in law.

SIXTH.—That the charges contained in the indictment do not constitute any offence under any of the statutes or laws of the United States; and the warrant for removal for trial under said indictment, is unauthorized and unlawful.

SEVENTH.—That said Edward H. Horner who was and is restrained of his liberty, is not Edward H. Horner, late of the Southern District of Illinois, the person charged in the indictment.

EIGHTH.—That the Circuit Court of the United States in not discharging the said Edward H. Horner upon the return of the writ of *habeas corpus* erred, and erred in dismissing said writ.

POINTS.

First Point.—THE APPEAL IS FROM THE FINAL ORDER MADE AT A STATED TERM OF THE CIRCUIT COURT OF THE UNITED STATES DISMISSING THE WRIT OF *habeas corpus* AND REMANDING THE APPELLANT TO THE CUSTODY OF THE MARSHAL AND IS APPEALABLE TO THIS COURT.

Carper *vs.* Fitzgerald, 121 U. S., 87.
In re Palliser, 136 U. S., 262.
In re Neagle, 135 U. S., 1.

Second Point.—THE APPELLANT IS RESTRAINED OF HIS LIBERTY FOR AN ALLEGED VIOLATION OF THE "LOTTERY ACT," R. S. SEC. 3894, AS AMENDED BY ACT OF SEPTEMBER 19, 1890.

That act is invalid, being an attempt by Congress to exercise powers not conferred upon it by the Constitution and in violation of the first amendment thereof, "Congress shall make no law * * * abridging the freedom of speech or of the press."

This question is now before this Court in *Ex parte* George W. Dupre, and *Ex parte* John L. Rapier, and no elaboration of arguments there made will be attempted in this case.

Third Point.—WE, HOWEVER, HERE PRESENT, AND CLAIM TO BE UNCONSTITUTIONAL AND VOID, THAT PART OF THE STATUTE WHICH MAKES THIS APPELLANT LIABLE TO TRIAL IN THE DISTRICT COURT OF ILLINOIS FOR ACTS COMMITTED IN NEW YORK, IN THE SOUTHERN DISTRICT OF NEW YORK.

The decision, by this Court, in the cases above referred to, if it sustains the petitions, is decisive of this appeal, and entitles appellant to a reversal of this order, and to his discharge. Included in this appeal, however, if decision there is adverse upon the constitutionality of the statute, is the question of the right of the appellant to be tried in New York, and not in Illinois, under the provisions of the Sixth Amendment to the Constitution.

"In all criminal prosecutions the accused shall "enjoy the right to a speedy and public trial by a "jury of *the State and district wherein the crime* "*shall have been committed.*"

The act of appellant whereof offence is alleged is, for example, in the first count:

"*deposit in the Post Office at New York a certain* "*circular containing a list of prizes awarded at* "*the drawing of a lottery.*"

The statute provides, last clause of Sec. 3894:

"Any person violating any of the provisions of "this section may be proceeded against by infor- "mation or indictment and tried and punished, "either in the district at which the unlawful pub- "lication was mailed, or to which it is carried by mail "for delivery according to the direction thereon,

" or at which it is caused to be delivered by mail " to the person to whom it is addressed."

The statute attempts to create three different offences. It provides:

" Any person who shall knowingly deposit or " cause to be deposited, or who shall knowingly " send or cause to be sent, anything to be conveyed " or delivered by mail in violation of this section, " or who shall knowingly cause to be delivered by " mail anything herein forbidden to be carried by " mail, shall be deemed guilty of a misdemeanor, " and on conviction shall be punished by a fine of " not more than five hundred dollars or by im- " prisonment for not more than one year, or by " both such fine and imprisonment, for each of- " fense."

The three offenses are—

(1). Knowingly depositing or causing to be deposited such forbidden matter in the mails.

(2.) Sending such matter or causing it to be sent by mail.

(3.) Knowingly causing such matter to be delivered by mail.

By the clause under consideration any one of the three offenses can be tried and punished in the district where mailed—or to which it was carried or where delivered.

This Statute presents directly the question whether a statute is in violation of this clause of the Constitution, which declares that an offense to wit, depositing, begun, continued and completed in

one district can be tried, and offender punished in another district.

In the Commerford case 25 Fed. Rep., 902 it was held.

> When a letter containing "obscene matter "is deposited in the Post Office the offense *is com-* "*plete*, and the party violating the statute *must be* "*indicted and tried in the district where the letter* "*was so deposited.*"

So in this case the offense of depositing is entirely completed in New York.

Can such act constituting an offence of "knowingly depositing" prohibited matter when done in the city of New York be made by this statute triable in Illinois or any other State to which the prohibited letter, may be directed?

Is such a statute valid?

We respectfully submit it is not—

The Constitution secures the right to the accused "to a speedy and public trial by an impartial jury "of the *State and district wherein the crime* "*shall have been committed*."

The statute does not provide that the offence of "depositing" may be tried where "deposited;" of "carrying or sending" when it was "carried or sent" of "causing it to be delivered" where it was "caused to be delivered."

On the contrary, it distinctly and definitely says, any person for violating "*any of the provisions*" can be tried and punished at any of the places, either in the "district where mailed," or "to which "it is carried by mail for delivery according to di-

" rection," or " at which it is caused to be delivered " to the person to whom it was addressed," without reference to place where offence complained of was committed—any of a number of places—indiscriminately. If offence for which information or indictment is had, is the first offence, to wit, "depositing," the offender can, according to the statute, be tried and punished in that district, or to which it was carried by mail, or at which it was actually delivered—for "causing to be delivered" in district where deposited, or where actually delivered, and so on.

It is not a case of offence "begun in one judicial " circuit and completed in another," as to which Sec. 731, R. S., provides, "shall be deemed to have " been committed in either, and may be tried in " either district in same manner as if actually and " wholly committed therein."

The statute says explicitly—for the offence, " depositing," the accused may be tried and punished in the district to which letter is directed, or where actually delivered.

" Depositing " is a single act. It is begun, continued and completed in the district where it occurs. Nothing more than the single act of depositing the prohibited letter is required to be proven. It is a single, abstract, completed act—not continued, continuous or extended beyond the district where it actually occurs. This offence, whatever may be said of the others, is not begun in " one judicial " circuit and completed in another."

Commerford case, *supra*.

It is a clear, manifest violation of the constitutional right of the accused.

The Palliser case, 136 U. S., 267, recently considered by this Court, is in no way in conflict with the contention here made. But on the contrary, that case is in entire harmony with it, and is placed expressly upon the ground that the offence committed was committed in Connecticut.

Says the Court in that case:

"In the case before us the offence charged being "an offer of money or a tender of a contract for the "payment of money contained in a letter mailed in "New York and addressed to a postmaster in Con- "necticut to induce him to violate his official duty, "it might admit of doubt whether any offence "against the laws of the United States was com- "mitted until the offer or tender was known to the "postmaster and might have influenced his mind. "But there can be no doubt at all that if any offence "was committed in New York, the offence contin- "ued to be committed when the letter reached the "postmaster in Connecticut; and that if no offence "was committed in New York an offence was com- "mitted in Connecticut, and, that in either aspect, "the District Court of the United States for the "District of Connecticut had jurisdiction of the "charge against the petitioner.

"Whether he might have been indicted in New "York, is not presented by this appeal."

This statute making the accused triable in another district for the offence of depositing, which, from its very nature, is a single act begun, continued and completed, where done, is the plainest violation of the Constitution, and that it is unconstitutional and void, is in entire harmony with the decision *in re* Palliser.

Fourth Point.—EXCEPT FOR THE PROVISIONS OF THIS STATUTE AS TO THE PLACE OF TRIAL, AND WHICH WE CONFIDENTLY SUBMIT WILL BE HELD BY THIS COURT TO BE UNCONSTITUTIONAL, THE DISTRICT COURT OF ILLINOIS CLEARLY HAS NO POWER TO PUT ACCUSED ON TRIAL OR REQUIRE HIM TO PLEAD TO AT LEAST FOUR OF THE FIVE COUNTS OF THE INDICTMENT—TO THE CRIME ALLEGED THEREIN—TO WIT "DEPOSITING PROHIBITED CIRCULARS."

The learned District Judge who made the order of removal, in effect, concedes this—

After stating the three separate offences contained in the statute, the District Judge says—

"The first and second offences do not require for "their completion that the matter deposited in the "mails for transmission should in fact be de- "livered. All that is required to constitute those "offences is that the prohibited matter should be "knowingly deposited in the mails or knowingly "sent to the mails for the purpose of transmission; "and if those offences are completed at the place "where the prohibited matter is deposited or sent "for deposit in the mails, whether the matter be "transmitted or not, it may be that under the "constitutional provision invoked no trial for those "particular offences could be had in any other dis- "trict."

Opinion, p. 13, Record.

Thereupon the learned Judge in his opinion holds the crime alleged in the fifth Court of the indictment, to be triable in Illinois as that count he "claims alleges the third offence to wit, "causing "the delivery by mail" and makes an order.

"To remove the said Edward H. Horner forth-
"with to the Southern District of Illinois to be
"tried in said District *upon such counts in the*
"*indictment* now pending in said district as the
"said Edward H. Horner *can be legally tried*
"*upon.*"

Assuming that the fifth count does allege such a crime we insist that the order is illegal upon two grounds:

FIRST.—*Notwithstanding its language it does put the accused upon trial in Illinois upon the whole indictment.*

SECOND.—*It is void for its indefiniteness and does not inform the accused "of the nature and cause "of the accusation."*

FIRST.—The accused by the order is put upon trial upon the indictment—not upon any particular portion of it. The order does not pretend to limit the Court in Illinois—or decide upon what the trial is to take place—and, if it did, it would be nugatory without power to restrain the Illinois Court, when by this mandate the accused is in its territorial jurisdiction. But the order says: "upon such counts as he can be legally tried upon." What are those counts? Who is to decide it? Clearly the Illinois Court. That Court is to put the accused upon trial for the whole; it may or may not decide one or another or all of the counts are or are not triable there; that a trial there is or is not constitutional. The accused is placed in its jurisdiction to answer upon this indict-

ment charging him in four counts with the offense of "depositing" several different circulars relating to various bonds of different cities and governmental bodies; in another count with the offense of "causing to be delivered," only one circular relating to Bonds of the City of Antwerp. These are distinct crimes—on different circulars relating to different bonds.

The accused is there upon this order of removal, and must answer, plead, move to quash or demur. *He is on trial.* That Court may quash—may sustain demurrer or overrule. He is placed exactly where it says the accused cannot be placed, assuming this statute to be unconstitutional, and we submit with confidence it is. The moment the accused is forcibly taken into that jurisdiction he is put into jeopardy, forced to a trial, be it upon one plea or another, and to submit to *its* decision. That Court has no constitutional power to arrest him—to require him to plead—to try him—to punish him—to put him in jeopardy of its decree, or to examine fact or to decide law, upon this crime of "depositing."

The accused cannot be sent to Illinois to give the Court physical control of his person *thereto to be put in jeopardy and on trial in an unconstitutional manner, or before a Court whose acts and dealings with the offense are unconstitutional and void.*

Mr. Justice Blatchford of this Court, then Judge of the District Court of the United States for the Southern District of New York, in the Dana case, 7 Benedict, 1, passed upon the principle here contended for.

It was sought to remove Mr. Dana to the District of Columbia for trial for criminal libel. It appeared by the law of the District the accused was to be tried by the Court, with right to defendant after such trial and judgment, if aggrieved, to appeal to another Court where the trial must be by jury.

The application was resisted on the part of the defendant, on the ground that the law of the District of Columbia, Act of Congress of June 17, 1870, as provides for trial by the Court without a jury is repugnant to the provisions of the Constitution.

Act 3, Sec. 2: "That trials of all crimes except "impeachment shall be by jury," and to the sixth amendment, "The right to trial in State and District where offense was committed."

Justice Blatchford refused to grant the removal—holding the act, providing for such mode of trial, unconstitutional, and says:

"In my judgment the accused is entitled, not to "be first convicted by a Court and then to be ac- "quitted by a jury, but to be convicted or acquitted "in the first instance by a jury. As, therefore, "the defendant, if removed to the District of Co- "lumbia, will be tried in a manner forbidden by "the constitution, I must decline to grant the war- "rant."

So in this case—the accused will be *tried* by an *unconstitutional tribunal* in an unconstitutional manner. If it is the duty of the District Judge to let the Illinois Court *decide* it has no jurisdiction on one or all the counts; of one, or all, or none of the alleged crimes, then it was the same in the Dana

case. Mr. Dana should have been removed and left to the Court in the District of Columbia to decide it had or did not have constitutionalpower.

The Dana case is the well settled law and has been quoted with approval by this Court (*In re* Palliser). The decision of Judge Brown in this case is clearly wrong. He should have refused the order of removal at once, on being convinced he was sending the accused to be tried upon charges—the first four counts, by a Court which had no constitutional power to try.

"It is the constitutional right of the citizen to be "tried in the district in which the offence imputed "to him is alleged to have been committed and not "elsewhere."

In re Buell, 3 Dillon, 121.

But it may be asked—Does the appellant claim that, in every case where some of the counts of an indictment are bad or insufficient, and others properly and legally drawn, and constitute an offence triable in the district to which removal is sought, an order for removal can not be properly made.

No such claim is made. In an indictment some counts claimed to cover offence may be bad, others good, sufficient to cover the offence. The test is what offence is claimed. Various counts may be, and often are, for one offence.

Our contention is, that in this case under the guise of counts, different offences are attempted to be charged. Some are triable in one place, others in another. The substantial part of the crimes alleged occurred and must be tried in New York—

to wit: the crimes included in the first four counts. The prosecution claims that because the crime alleged in one count are triable in Illinois, that the accused will be transported, notwithstanding the substantial part of the offenses charged is triable only in New York. On the other hand we claim that the indictment must not contain counts or portions—putting the accused on trial for offenses not there triable, and if it does the order must be refused. It is erroneous to claim as the prosecution claims that because a part, no matter how little, is there triable it is sufficient. On the contrary the true and correct principle is the removal must be refused, as by granting removal the transported prisoner is of necessity put to his plea and trial in a tribunal forbidden by law.

If the accused is transported under this indictment, who is to say upon which offence he is to be tried. The District Judge in New York has not defined, and, if he had, the Illinois Court would follow it or not as it chooses. The District Judge erroneously, by his order, places the accused in the power of the Illinois Court.

The accused, by this proceeding, is put in jeopardy on the whole indictment. If removed under an indictment charging him with only a crime there triable, he could not be arrested and held under another indictment, whether the alleged offense under such other indictment is there triable or not. It is similar to the proceedings and the rights of the accused under extradition. He cannot be put to his plea. He cannot be arraigned —cannot be put in jeopardy on such proceeding.

Extraditing alleged offenders upon indictments the substantial part of which is not included in the power of the Court to indict or hear or try, because a part is for offences there cognizable would open an easy door to a violation of the right of asylum.

That there is a right of asylum and freedom from arrest or trial for any other than the extradited offence is well established.

A prisoner surrendered by the English government under the treaty of 1842, upon one offence, cannot be put upon trial for another.

U. S. *vs.* Rauscher, 119 U. S., 407.

The question as between the States arose *In re* Tilton, 45 Fed. Rep., 472.

The prisoner was brought from New York to Vermont on proceedings tantamount to extradition, on a charge of larceny. In Vermont he was arrested for intoxication, and held until he could be arrested for forgery. The prisoner was discharged on habeas in the United States Circuit Court, with protection to enable him to return to the State of New York.

The Court says, in that case:

"In U. S. against Rauscher, this Court held
" that a prisoner surrendered under the treaty of
" 1842 of Great Britain could not be tried for any
" other offence until after a reasonable time to de-
" part, on the ground that, by the general Inter-
" national law, the country receiving an offender
" against its law from another country had no
" right to proceed against him for any other of-
" fence than that for which he had been delivered

"up, and that the treaty carried out this principle. "The States of the United States are independent "governments, and have all the rights of nations, "except what have been conferred upon the gen- "eral government. The prisoner extradited is en- "titled to freedom from arrest or to answer before "any Court or tribunal for crime or in a civil "suit; he is entitled to immunity from arrest un- "til the lapse of reasonable time to allow him to "return to his place of asylum."

In re Baruch, 41 Fed. Rep., 472.

In re Reinitz, 39 Fed. Rep., 204.

These cases are in accord with the decision of this Court in the case of Rauscher, in which, upon full consideration and review of the leading authorities, this Court definitely settled the question, holding that an extradited prisoner cannot be arrested or tried for any offence except that for which he was extradited, until the termination of the extradition proceedings, and the lapse of reasonable time thereafter to enable him to return to the country from which he was brought.

The objection now made is not a mere theoretical one, but one fraught with very substantial and grave consequences. As we have shown in an ordinary case where the accused is removed to a foreign tribunal for trial, for one offense he can not be called upon to answer for any other offense. But the doctrine—contended for by the prosecution in this case is that in order to circumvent this right, a foreign tribunal need only incorporate into an indictment which contains one proper count on an extraditable offense, other counts which do not set up extraditable offenses, and by this manifest

evasion acquire jurisdiction and control to put an accused in peril for offenses for which by direct means, it had clearly no right to compel him to answer.

SECOND.—IN THIS PROSECUTION THE ACCUSED IS NOT INFORMED OF THE "NATURE AND CAUSE OF THE ACCUSATION," AND THE PROCEEDINGS ARE IN VIOLATION OF THE SIXTH AMENDMENT, "THE ACCUSED SHALL BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION."

a. Under the order of removal.

b. Under the indictment.

a. Under the order of removal.

To be tried in said district upon such counts "as Edward H. Horner *can be legally tried upon.*"

The nature and cause are in no sense shown. What is the accused to meet? By implication and from the opinion some crimes alleged are not legally the subject of trial—but order fixes none. As already shown, the foreign Court should not be vested with enforced jurisdiction by removal to enable it to jeopardize defendant, but in addition the order is itself so lacking in "nature and cause of accusation" that it deprives accused of his constitutional right to know for what he is extradited—what he is to meet.

In U. S. *vs.* Cruikshank, 92 U. S., 558, it was held the accused has the constitutional right to be informed of the nature and cause of the accusation and this requires that the offence must

be set out "with clearness and all necessary cer-
"tainty, to apprise the accused *of the crime* with
"which he stands charged."

Under this proceeding the crime of which Horner is legally charged and which he is to meet are not set forth—whether—depositing, sending or causing delivery. If accused is to meet and tried for all the offences upon all the charges in the indictment the proceeding is clearly illegal.

The accused at every step must be apprised of what he is to meet.

"That every person has a right to be informed of
"the nature and cause of the accusation," and all necessary "certainty to be apprised of the crime of which he stands charged applies as well *to pre-*
"*liminary proceedings for arrest as to indict-*
"*ment itself.*"

In re Coleman, 15 Blatch., p. 415.

In a proceeding, which sends a man hundreds perhaps thousands of miles from his home—in a jurisdiction, where as in this case the accused has never been, the most careful and rigid application should be made protecting the rights of the citizen in requiring that the nature and cause of the accusation be clearly set forth.

b. Under the indictment.

The indictment is fatally defective.

"The object of an indictment is first to furnish
"the accused with such a description of the charge
"against him as will enable him to make his de-
"fence * * and second to *inform the Court of*
"*the facts alleged so that it may decide whether*

"*they are sufficient in law to support a conviction*
"*if one should be had. For this, facts are to be*
"*stated not conclusions of law alone.*"

U. S. *vs.* Cruikshank, 792 U. S., 558.

The allegations of the indictment constituting the offence are at most only conclusions and not facts.

1. The offence consisting of written words must be set forth in the indictment.

2. The allegations in the indictment do not constitute a crime.

(1.) *Alleged offense is depositing written words prohibited by the statute.*

In such case the words must be set forth in the indictment.

The case of U. S. *vs.* Noelke, 17 Blatch., 554, arose under the old lottery statute and was on a motion in arrest of judgment. On page 560, the Court says:

"Where the offence consists of words spoken or
"written the general rule is those words must be
"set forth in the indictment. The rule has been
"applied in a large number of cases, including the
"offence of sending threatening letters (Rex *vs.*
"Lloyd, 2 Easts, P. C., 1122.) In U. S. *vs.* Ben-
"nett, 16 Blatch., C. C. R., 338, the rule is rec-
"ognized in the case of sending obscene matter
"through the mail, but rule did not apply if mat-
"ter too indecent to put on record. This objection
"appears to have been regarded as one of substance
"and not of form merely, and therefore not aided
"by verdict at common law. (Bradlaugh *vs.* The
"Queen, L. R., 3 Q. B. Div., 618) and for the
"same reason we think it is not cured by our
"statute. Sec. 1025."

The statement in the indictment—purporting to constitute an offense—is at best only a conclusion, and not facts.

If, after conviction, such indictment would not support it, a citizen who asks release on this proceeding certainly should not be sent to a foreign State to go through with a trial which would not support a verdict.

(2.) *The allegations of the indictment do not constitute any crime.*

The indictment is clearly attempted to be made under the second paragraph of the statute, and not under the first.

The first paragraph inhibits mailing letter, postal card or circular of "lists of the drawings."

The second paragraph prohibits circular containing "any list of prizes awarded at the drawings." The indictment in every count uses the words "list of prizes awarded at the drawing" part of the exact language of the second paragraph.

Take the fifth count—the only one which the learned Judge below considered as justifying removal. It alleges—

"A certain circular containing a list of prizes "awarded at the drawing of a lottery in two and "one half per cent. city of Antwerp bonds of 1887, "at Antwerp."

That does not constitute any offence under this statute.

The Noelke case, p. 557, in dealing with the old statute "No letter or circular concerning lotteries,

so called gift concerts, or other similar enterprises, offering prizes * * &c., held that the words "offering prizes" qualified similar enterprises and not lotteries. Possibly if we were dealing with the first paragraph of this statute it could be suggested that that reasoning might apply. But to the second paragraph it has no application. By the very terms of the statute it is only the list of prizes awarded at the drawing—not of any lottery or a lottery or every lottery, but "list of prizes "awarded at the drawings of any such lottery." "Such" is a word of limitation of description. The statute shows what limitation, what description is meant. "Any lottery or gift enterprises of any kind *offering prizes dependent on lot or chance.* The very essence of the crime is not averred.

List of prizes awarded at the drawing of a lottery in two and one-half per cent. City of Antwerp bonds is no more an allegation of crime than it would be to say a list of prizes awarded at the drawing of a lottery in bonds of the United States. We redeem bonds by the prize or hazard of drawing—by lot—by chance. Corporations constantly redeem their bonds by drawings—the list is published—call it prize or call it misfortune, and it is either as may be the market or financial standing of obligor, or rate of interest secured whether above or below the market rate. Every drawing for redemption is a lottery in bonds. It is absurd to call that a crime. And yet that is all this indictment, upon which a citizen is to be sent to a foreign State, alleges.

The Court below in its opinion, says: "Objection "is made, no offence is charged (p. 12), and says it is "the duty of Court to look into indictment and see "whether offence is charged and can be legally tried "in the forum to which removal is asked." This failure of allegation is not defect in form—it is substance.

We respectfully submit:

1st. That the indictment must set out the circular in *haec verba* so the Court can see if it constitutes the offence claimed before it will send a citizen to a foreign State for trial and not rest on inference and conclusions of the pleader.

2d. That as to this indictment, in any event, whether first proposition is well founded or not—the allegations in this indictment are not sufficient to constitute a crime under this statute.

Apply the rule laid down in U. S. *vs.* Cruikshank, 92 U. S., 562, "Offences created by statute as well as offences at common law must be accurately and clearly described in the indictment. *It is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the statute is composed.*

Tested by that rule this indictment is clearly insufficient.

United States *vs.* Mann, 95 U. S., 580.

If the word "lottery" contains in itself such elements of immorality and crime, that its mere mention contains all the ingredients of the statute then nothing more can be said.

"Forgery" certainly is as immoral, criminal and repulsive as "lottery" can be claimed by the most zealous.

In a case of forgery it is not enough to charge in the complaint the crime of forgery generally, but time and place and the nature of the forgery and *of the forged instrument* must be sufficiently specified.

In re Tarey, 7 Blatch., p. 35.

Forgery confessedly has a far more exact and limited meaning than the word "lottery." Forgery cannot be used as applicable to any act not a crime, lottery can be so used *e. g.* drawing of railroad or government bonds—choice of directors for different terms of office.

In this indictment there is nothing but this universal, elastic criminal effect of the word "lottery" that even approaches making this indictment sufficient.

An allegation that one obtained goods of another by false pretences, or by cheating is not in a legal sense a charge of crime, for it may be true and yet no crime may have been committed.

55 New York, 189.

The right to demand and to extradite a fugitive from justice as between the States is based upon Sec. 2, Art 4 of Constitution :

"A person charged in any State with treason, "felony or other crime who shall flee from justice "and be found in another State, shall on demand "of the executive authority of the State from "which he fled be delivered up to be removed to "the State having jurisdiction of the crime."

And Sec. 5287 of R. S.:—

"Whenever the executive * * * demands "and produces a copy of indictment or affidavit "* * * charging the person demanded with "having committed treason, felony or other crime, "* * * it shall be the duty of the executive of "the State to where such person has fled to cause "him to be arrested, &c."

The Courts on *habeas corpus* have jurisdiction to examine the grounds upon which the executive warrant was issued, and in case the papers are defective and insufficient, to discharge the prisoner.

People *ex rel.* Lawrence *vs.* Brady, 56 N. Y., 183.

In that case the affidavit in substance charged the fugitive with confederating with others to cheat and defraud a person of his property by false pretences and devices; and that the conspirators did obtain the property with intent to cheat and defraud.

The false pretenses were not set out, or the means by which the cheat was to have been and was effected.

Held the affidavits were not sufficient to authorize the issue of the warrant, and the prisoner was discharged.

Under Sec. 1014 of the R. S., analogous to extra-

dition, under which the Judge of U. S. District Court orders removal to the district where the trial is to be had, the language is: "For any crime or offense against the United States, the offender may be imprisoned or bailed for trial before such Court of the United States *as by law has cognizance of the offense.*"

The Court to whose jurisdiction the prisoner is to be sent, must have by law cognizance of the offence; and

SECOND.—The cause of offense must be established.

It was the duty of the Court below to look into the indictment, and if it was fatally defective in essential averments to constitute an offense to refuse to issue the warrant.

In re Buell, 3 Dillon, p. 120.

Says the Court in that case:

"I cannot agree with the proposition, that the "question of the sufficiency of the indictment is "for the Court in which it is found, and not upon "the Judge by whose order removal is sought. "This provision devolves on a high judicial "officer of the Government. In a country of such "vast extent as ours it is no light matter to arrest "a supposed offender and remove him hundreds, "it may be thousands of miles for trial. The law "wisely requires the previous sanction of a district "Judge. A district Judge who should order the "removal of a prisoner, when the only probable "cause relied on was an indictment, and that in- "dictment failed to show any offense against the "laws of the United States, or showed an offense "not committed or triable in the district to which "the removal is sought, would misconceive his

"duty, and fail to protect the liberty of the "citizen."

The Court below admitted this duty, but dismissed the consideration that an offence was charged "in at least general terms."

This objection that no crime is set forth in the indictment is certainly the subject of special demurrer. The Court below says, p. 12: Objections that might be raised "on special demurrer are not "proper to be considered here." That is manifest error.

Fifth Point.—IT IS SUBMITTED THAT NO TRIAL CAN BE HAD UNDER THE FIFTH COUNT OR FOR ANY OFFENCE COMMITTED UNDER THE STATUTE EXCEPT IN THE PLACE WHERE THE LETTER IS MAILED.

THE DISTINCTION BETWEEN A CRIME AGAINST THE MAILS AND ONE BY MEANS OF THE MAILS IS CONTROLLING. THE CRIME HERE CHARGED IS AGAINST, NOT BY MEANS OF.

The third clause of Section 2 of Art. III of the Constitution provides that trial of all crimes except impeachments shall be held in the State where the said crimes shall have been committed.

The sixth amendment provides:

"In all criminal prosecutions the accused shall "enjoy the right to a speedy and public trial "by an impartial jury of the State and district "wherein the crime shall have been committed,

"which district shall have been previously ascer-
"tained by law."

The prosecution relies for its position that trial be had herein in Illinois on

In re Palliser, 135 U. S., 257.

The facts of that case were, however, radically different from those arising under the statute in question. In the Palliser case a statute of the United States was involved which made it an offence to make any offer to a postmaster to induce him to violate his official duty. There the United States acquired cognizance of the crime of offering to a postmaster because the offer was made to a Federal officer in the discharge of his Federal duties. This Court held that as the crime consisted in the *offer*, it was not completed until the letter making the offer was delivered to the postmaster and said that it might well be doubted whether the accused could be punished in any other district than the one where the letter was delivered. There a crime was committed *by means of* the postoffice. It was completed when the postmaster delivered the letter. Here no crime was committed by means of the postoffice. It is not and cannot be a crime against the United States to *deliver* to a person a paper or letter concerning a lottery. Congress has nothing to do with such an offence and any United States statute seeking to punish the same would be clearly unconstitutional. The learned Solicitor General says:

"The delivery of the letter in the Southern Dis-
"trict of Illinois was as much the act of Horner in
"the latter district as if he had used for the pur-

"pose a pole long enough to reach from a point "outside the district."

We accept the simile. By so doing Mr. Horner would have made himself amenable to the law if the *State of Illinois* provided it had passed one prohibiting the delivery of a lottery communication. In that case it would be entirely immaterial whether the communication was delivered by mail or by a pole or otherwise. The offense would consist in the *delivery*. But let us suppose that the United States owned the pole, and there was a Federal law against the use of the pole for the purpose of delivering lottery circulars, and then let it be further supposed that Mr. Horner used that pole in New York and hoisted a lottery circular over to Illinois. Would it be claimed by any one that for the offense of using the pole he could be tried in Illinois? Can there be any doubt that the offense of using the pole was committed in New York? The United States has no power to punish for the offense of delivering matter *as such* any more than it has to punish for inciting to murder. As it owns the pole, it has (assuming constitutionality), power to punish for the crime of using its pole for a given prohibited purpose. In the case of the offense of delivering prohibited matter, the crime is committed when the delivery is made. In the case of the offense of *using the pole* the crime is committed when the pole is used. The offence may be the using of the pole for one purpose or another purpose, and the purpose may be completed or fulfilled in another State, and it may be necessary in order to show that

the pole was *used* for the prohibited purpose in New York State for instance the fact that such intent was consummated in a foreign State, but the pole, nevertheless, was *used* in New York. There the physical power was applied, and the only physical power which the offender exerted and there be performed all the acts on which his crime can be predicated. The distinction between the crime in the Palliser case and a crime committed under the statute in question may well be shown by the following illustration: A statute which prohibits the delivering or causing to be delivered a prescribed article would be like that involved in the Palliser case. A statute which prohibits anyone from *employing* another person for delivering the prohibited article is like the statute in question. In the former, the offence consists in the delivery, and, of course, is committed when delivery is made. In the other, the offence consists in the employment and is committed when the employment is made. If it be held that the statute in question has the same signification as the first statute above mentioned, by way of illustration, then it is unconstitutional, for Congress has no power to create, as an offence, the crime of delivering lottery matter or any other matter. Its jurisdiction attaches only by virtue of its right to regulate the uses to which the mails shall be put, and its power in the way of punishments is accordingly restricted to punishments for *using* or *employing* the mails for purposes which it has prohibited.

The learned Solicitor-General says:

The offence may be described as "causing the circular to be delivered 'by mail,'" and then says: "Horner caused the circular to be delivered in the southern district of Illinois."

It is respectfully urged that a correct mode of statement would be "Horner, *in New York*, caused the circular to be delivered in the southern district of Illinois." If the *objective* crime were the delivery, then the learned Solicitor-General's statement would be correct. But, as such is not, and cannot constitutionally be, the case, the objective crime is clearly the *causing, i. e., the act of causing* or the *causation*. Certainly the *causation* on the part of the accused (and it is only with *his* causation that we are concerned) was done and committed wholly exclusively and completely in New York.

But taking even the Solicitor-General's mode of statement, it can be shown that the views here contended for are correct. His statement is "Horner caused the circular to be delivered in the southern district of Illinois." The question arises what word is qualified by the phrase, "In the southern district of Illinois," which is, of course, assumed by the Solicitor-General as stating the place of commission of the crime.

A grammarian would at once answer that "In the southern district of Illinois" qualifies "delivered." It is perfectly apparent that the statement cannot be read, "Horner in the southern district of Illinois caused to be delivered." As we have above shown that the offence consists in *causing*, and not in the delivery, it is plain that in order to support

the contention of the prosecution, the phrase "In the southern district of Illinois" would have to be deemed to qualify caused, so that the statement should properly read, "Horner in the southern district of Illinois caused to be delivered." The mere statement shows the fallacy of this position.

This argument is addressed not only to the Solicitor-General's argument, but bears directly upon the statute, for the statuatory language is, "anyone who shall cause to be delivered."

If we are not clearly correct in the above, then the offence, "causing the circular to be delivered by mail in a certain place," is at least ambiguous, and the ambiguity by well settled rule of construction must be resolved in favor of the accused. Especially must this be so in view of the harsh consequences which would ensue from a contrary construction, and in view of the fundamental spirit of our law prescribing a trial in the vicinage, and the exceeding care with which the same has been incorporated in our constitutional enactments. Preciously as the trial in the vicinage was guarded in England, there is tenfold more reason for preserving it jealously in a country vast in its territorial extent as are the United States. A construction as maintained by the prosecution would subject a citizen to trial *three thousand miles from home for a misdemeanor.*

In view of the time honored safeguard as to trial in the vicinage and of the watchfulness and zeal of the people in this country in preserving its spirit as shown in the above provision in the original constitution and the amendment to the same, the

Court should give that provision and the amendment a liberal construction.

It certainly is shocking to the popular mind to think that by merely depositing a letter in the post-office of New York, a man may be deemed to have committed a crime in Illinois, and dragged from his home for trial in that distant *forum when he had done nothing to violate any law of Illinois.* There is no reason for doing so, not even convenience of proof for the government. For if tried in Illinois, under the theory of the prosecution, no conviction could be had without proof of *depositing in the mail* of New York. Proof of such depositing would be the only means of showing that Mr. Horner caused to be delivered. As the United States postal regulations are before the Court, it can see that the only was to violate the statute is to deposit in the mail, *i. e.*, the only act by which one can commit a crime under it is the act of depositing. It cannot be maintained with reason that the crime is committed elsewhere than in the place where the act which constitutes that crime is committed.

There is only one way of committing crimes, and that is by acts, and when those acts are done the crime is perpetrated. And the acts constituting the crime are in all cases the personal acts of the offender *with the single exception of cases in which the offender uses an agent or instrumentality for committing the crime.*

But it will be claimed by the prosecution that Mr. Horner used the United States postal instrumentalities as agents for the commission of a crime

and accordingly he is punishable where such crime was committed. This is not so ; and in it lies the error which is the vice of the prosecution's entire claim. *It is not a crime against the United States to deliver a circular relating to a lottery*, and hence it cannot be truthfully said that by causing the United States mail to deliver such circular the mail was used as an agent for the commission of a crime. We come back again to the old proposition that the only crime consists of the employment of the mail.

The cases cited by the Court in the Palliser case as authorities sustaining the views in that case are in entire harmony with the principle here contended for.

In King *vs.* Girdwood, 2 Est. P. C , 1120 :

The offence was threatening to kill. The threat was sent by letter. It was held trial could be had where letter delivered, for the *threat*, which was the act constituting the crime, was there committed.

Also in Esser's case, p. 1125 :

Threat to make accusation of unnatural crime in order to extort money.

In Reg. *vs* Leech, 7 Cox Crim. Cases, 100, it was for obtaining money under false pretences.

In Rex *vs.* Rogers, 14 Cox Crim. Cases, 22 :

In that case the indictment was for embezzlement. The accused had right to collect, but wrote a letter refusing to pay over and was indicted for embezzlement at place where letter received. Court held non-delivery over of money not *per se* embezzlement, and up to time letter received at Middlesex, there was no embezzlement.

In each of those cases, the crime was an offence committed by *means* of the mails to accomplish the crime at place of delivery of letter. So in this case if "delivery of letter" to a citizen is a crime under State or U. S. Statutes (if it could be so), then the crime would be there committed by *means* of the mail.

But that is not this case, the offence is *against* the mails.

It is the same act. The learned Solicitor-General admits this.

"The other four counts are merely descriptions *of the same act* as that described in the fifth count in different language.

It will be argued with great nicety by the other side, that the crime of "CAUSING TO BE DELIVERED" cannot be completed until the delivery is made; and, hence, it is a continuous crime proceeding from the moment the matter is deposited until it is delivered, and that, accordingly, it falls within Section 731 of the Revised Statutes, providing for trials of continuous crimes.

The answer is, the Court must look at the substance of the offence, to determine the place of its commission.

Under the Post-office system, there is necessarily involved in each act of mailing, if successful, three things, to wit: (1) DEPOSITING; (2) SENDING TO BE CONVEYED; (3) CAUSING TO BE DELIVERED.

If the intention of Congress were to establish three separate and distinct offenses,—the one DEPOSITING; the other SENDING TO BE CONVEYED;

and third, CAUSING TO BE DELIVERED,—all arising out of the one single act of mailing; and to make them so separate and distinguishable that a conviction or acquittal for one should not be a bar upon an arraignment for the other, then the statute violates the constitutional provision to prevent a person from being placed twice in jeopardy for the same offense This is clearly so in view of the punishment provided in the statute "for each offence."

In order to support the constitutionality of the statute it is necessary to hold that there is but one crime created by the same. That requires us, therefore, to scrutinize the statute and determine what in reality is the substance of crime it creates.

It is evidently the crime of mailing. By mailing one deposits; by mailing, causes to be carried in the mail; and by mailing one causes to be delivered.

Evidently the statutory language consists of but three different ways of stating the same offense; this the Solicitor General admits in the above extracts from his brief, and as above stated, it must be so in order not to violate the constitutional provision against putting a person twice in jeopardy. Congress must know, and the Court knows the *modus operandi* of the United States mail service.

Suppose Congress should make three different offenses all arising from a single act, and provide for punishing a person for committing such act, three times, *i. e*, for each of such offenses; it would clearly be unconstitutional.

Such would be the case in reference to the stat-

ute in question, if depositing, causing to be carried and causing to be delivered is regarded each as a distinct and separate offense.

But they will not of course be so regarded, as the Court will strive to give the statute a constitutional interpretation, rather than one which would be unconstitutional and render the statute void.

In order to do so, it will be incumbent upon the Court to hold that there is is but one offense created by the statute.

The question will then arise, What is that offense? And that question can only be answered by saying we must look at the substance of the offense created.

Clearly the substance of the offense is MAILING.

Mailing will fill every provision of the act.

Of course, if Congress had power to make the delivery a crime, and the object of the statute was to prevent people from delivering certain prohibited matter, then the substance of the crime would be DELIVERING and not MAILING.

But as Congress has not such power, and it must be assumed did not intend to exercise it, the substance of the offense is the MAILING.

Where the Court can see that the essence and substance of a crime is committed in one place, it certainly cannot be held that Congress by the mere use of language in the description of a crime can prevent an accused from his constitutional right to trial in the district where the crime is committed.

No jugglery of words should be permitted to change what is the *natural* place of the commission of the crime. If so, the consequences resulting

might be revolutionary and utterly destroy the wholesome constitutional guarantees on the subject. Suppose that Congress, in order to make the punishment more oppressive, should change the designation of the crime "obstructing the mails" to "causing delay in the delivery of any letter," and let us suppose that under such altered statute a person should keep his boat in an open drawbridge and thus prevent a mail train from passing. Would it be held that such person could be tried in every distant place in which an addressee of a letter suffered delay in the delivery of his letter? It would be argued then as it is here that the crime is a continuing one and is not completed until the delay is suffered, but we apprehend the answer would be that the place where the obstruction was placed has from time immemorial been regarded as the *natural* place of the crime and we cannot permit a great constitutional safe-guard to be undermined by the mere use of words, changing the description of the crime from what its true and natural description is—

Suppose Congress should proceed still further:

"Causing delay to any official of the United "States in connection with the postal service of the "United States."

An obstruction is placed as before; and by reason of it the Post-Master General at Washington is delayed in the preparation of his annual report, because the mail train is conveying documents

which he needs for that purpose. Would that fact change the place where the crime was committed?

If the argument should be made in such a case as it is here by the prosecution, that the cause did not take effect until it reached the Post-Master General; and accordingly, it was a continuous crime and triable at Washington, such argument would not receive the sanction of any Court.

Numerous instances might be cited to show how utterly valueless would be the provisions of our Constitution as to place of trial, if, *when the essence of the crime remains the same and no new offense is reached*, Congress can by words of description change the *natural* place of a crime, and thus change at its will, the place of trial therefor.

Of course, if a new offense is sought to be reached, the argument does not apply. But here, no new offense is created.

It is very plain that the statute merely is designed to prevent certain matter from being mailed and that the offense is "mailing."

And the words "causing to be delivered by mail" when read in connection with the other provisions of the statute as to place of trial are clearly put there with the apparent design of changing the natural place of trial and evading a precious constitutional safeguard.

Sixth Point.—THE SUFFICIENCY OF THE INDICTMENT, IN ITS SUBSTANCE, IT IS THE DUTY OF THE COURT TO EXAMINE AND DETERMINE, AND THE DECISION IS REVIEWABLE IN THIS COURT.

Not the question of guilt or innocence—that is to be investigated where alleged crime was committed—but the *charge* of crime, its existence and sufficiency.

People *ex rel.* Lawrence *vs.* Brady, 56 N. Y., 182.

This appeal brings up the whole case, both law and facts, and imposes upon this Court the duty of re-examining it, upon the full record, as it was heard in the inferior Court.

In re Neagle, 136 U. S., 1.

Seventh Point.—IDENTITY OF ACCUSED.

The indictment is framed against *Edward H. Horner*, late of the Southern District of Illinois.

Under the warrant Edward H. Horner, of New York, is arrested.

The defendant must be described as of the town or hamlet or place and county of which he was or is.

Archibards C. P., 27

1 Wharton's Precedents of Indictments, 12.

The evidence on the part of the prosecution is that the accused was invariably found in New York, and was never known as a resident of the State of Illinois. Witness says: "All I know, is that the "person now in custody is Edward H. Horner, of "the city of New York."

Rec., p. 11.

The question here is not upon a conflict of evidence, as in the case of *In re* Cartes, 136 U. S., 330, but it is a case of no evidence.

As to particularity required on question of name.

U. S. Spintz, 18 Fed. Rep., 377.

Eighth Point.—THE ORDER OF THE CIRCUIT COURT SHOULD BE REVERSED, AND THE APPELLANT DISCHARGED FROM THE CUSTODY OF THE MARSHAL.

ALFRED TAYLOR,
FREDERICK S. PARKER,
HERMAN AARON,
Counsel for Appellant.

FILED.
DEC 30 1891

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In the Supreme Court of the United States.

OCTOBER TERM, 1891.

EDWARD H. HORNER, APPELLANT,
vs.
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} Term No., 1051.

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BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This is an appeal from an order of the circuit court remanding the appellant to the custody of the United States marshal after a hearing upon appellant's petition (Rec., p. 1) to that court for discharge under a writ of habeas corpus. The marshal had detained appellant under a warrant of removal to the southern district of Illinois, issued by the district judge, the Hon. Addison

Brown, under section 1014, Revised Statutes (Rec., p. 14), after a commitment for the purpose by John A. Shields, United States commissioner (Rec., p. 10). The commitment was ordered by the commissioner on the presentation of the certified copy of an indictment against Horner, containing five counts, charging him with a violation of the act of Congress amending section 3894, Revised Statutes, approved September 19, 1890, and known as the anti-lottery law, which indictment had been returned by the grand jury in the district court of the United States for the southern district of Illinois and averred the commission of the offenses within that district. The indictment was accompanied by evidence to identify Horner with the person indicted (Rec., pp. 10, 11).

The first four counts of the indictment (Rec., p. 6) charged Horner with depositing a certain circular, concerning lotteries, in the post-office at the city of New York, directed to a woman in Belleville, Ill., in the southern district of that State, which circular was carried by mail for delivery in accordance with the direction thereon. The fifth count charged that Horner on December 31, 1890, within the southern district of Illinois, unlawfully and knowingly did—

> Cause to be delivered by mail to Mrs. M. Schuchman, 624 Illinois street, at Belleville, in the State of Illinois and in said district, a certain circular containing a list of prizes awarded at the drawing of a lottery in 2½ per cent city of Antwerp bonds of 1887, at Antwerp, on the 10th of November, A. D. 1890; which said circular was then and there numbered 538, and had a caption printed thereon in substance as follows, viz: "Banking house of E. H. Horner, No. 88 Wall street," and was dated of the 27th day

of December, A. D. 1890; which said circular he, the said Edward H. Horner, theretofore, to wit, on the 29th day of December, A. D. 1890, did knowingly deposit and cause to be deposited in the post-office at New York, in the State of New York, addressed to said Mrs. M. Schuchman, at 624 Illinois street, in Belleville, in the State of Illinois, and which said circular was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois street, at Belleville, in the State of Illinois, according to said direction so upon said circular as aforesaid.

Section 3894, Revised Statutes, as amended September 19, 1890 (26 Stat., 465), under which the foregoing indictment was drawn, is as follows:

No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter-carrier.

Nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier.

Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense.

Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

APPELLANT'S ASSIGNMENT OF ERRORS.

Appellant has assigned twenty-three errors for the consideration of the court, which are to be found on pages 21 to 25 of the record. Assignments numbered 1, 2, 3, 4, 5, 6, 14, 15, 16, 17, 18, 19, and 20 attack the sufficiency of the counts in this indictment. Assignments numbered 7, 8, 9, 10, 11, and 13 allege that the warrant of removal, if executed, will deprive the appellant of the right, secured to him by Article III, section 2, of the Constitution of the United States, to be tried in the district where the crime charged was committed. Assignment No. 12 alleges that the warrant of removal is so indefinite and uncertain as not to apprise him of the nature of his offense and therefore violates the Sixth Amendment to the Constitution. Assignment No. 21

alleges that the Horner in custody is not the Horner indicted. Assignments Nos. 22 and 23 are of a general character, assigning no special ground for objecting to the order of the court below.

ARGUMENT.

The discussion of this case may be divided into four heads: First, the sufficiency of the indictment; second, the place of trial; third, the sufficiency of the warrant of removal; and, fourth, the identity of the appellant with the accused in the indictment.

THE INDICTMENT.

The first count charges that Horner deposited and caused to be deposited in the New York City post-office a certain circular containing a list of prizes awarded at the drawing of a lottery, describing the circular more definitely by stating the letter head of the circular and its number, 538, and that it was addressed to Mrs. M. Schuchman, 624 Illinois street, Belleville, Ill., and avers that it was carried by mail for delivery in accordance with the direction.

Section 3894 provides that—

> No * * * circular concerning any lottery * * * and no list of the drawings at any lottery or similar scheme * * * shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter carrier. Nor shall any * * * circular * * * containing any advertisement of any lottery or gift enterprise

> of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise * * * be carried in the mail or delivered by any postmaster or letter carrier.
>
> Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, etc.

The question is whether the first count correctly charges the misdemeanor denounced in the section just quoted. Of course the venue is laid in the southern district of Illinois, and, strictly speaking, if the offense charged is not triable in that district, the count is bad. The consideration of that feature of the count, however, will be postponed until we discuss the place of trial. The point now is whether an offense is properly described in the first count. It is described in the words of the statute. The section forbids a circular containing any list of prizes awarded at the drawings of any such lottery to be carried in the mails, and makes it a misdemeanor for anyone to deposit or cause to be deposited anything to be conveyed or delivered by mail in violation of this restriction. The count charges Horner with depositing a circular containing a list of prizes awarded at the drawing of a lottery, and then describes the circular by marks on it so that Horner may easily identify the same, ~~to be carried in the mail for delivery to another.~~

The word "such" before lottery in the statute has no particular significance, except to connect the two sen-

tences. It refers to the same lotteries advertisement of which through the mails is forbidden in the previous clause. In that clause the lotteries are thus referred to: "Any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance." A lottery is something which offers prizes dependent upon lot or chance, and the language "offering prizes dependent upon lot or chance," if it is to be read as qualifying "lottery" as well as "gift enterprise" (which may be doubted), is merely an elaboration or definition of that which lottery would mean without the phrase. The count refers to the lottery as one at which prizes were awarded. A lottery at which prizes are awarded, and not by lot or chance, would be impossible. Webster defines lottery to be "a scheme for the distribution of prizes by lot or chance." Its derivation from "lot" makes this meaning manifest. The word "such" in the second clause of the statute does not, therefore, limit the lottery, the lists of the drawings at which are made unmailable by the statute, to any particular kind of lottery. The word "lottery" is, therefore, a sufficiently precise term to use in describing the offense without describing what kind of a lottery it is. It is a general rule that in indictments for misdemeanors created by statutes it is sufficient to charge the offense in the words of the statute (*United States* vs. *Mills*, 7 Peters, 138, 142; *United States* vs. *Britton*, 107 U. S., 655; *Cannon* vs. *United States*, 116 U. S., 55, 78). This, as we have seen, has been done here. Every necessary element of the misdemeanor is set forth in the statute, and therefore an indictment which follows the statute contains every necessary element. Objection is made that the circular is not set out. There is no necessity for this. It is averred to contain a list of the prizes

awarded at a lottery, and its number, date, heading, and address are all set forth. Certainly the accused has all the necessary information to apprise him of the particular offense with which he is charged.

The second and third counts are like the first, except they are somewhat more specific in describing the lotteries. The second count specifies seven: One at Barletta, in Italy; another at Antwerp, in Belgium; a third at Windeschgraetz; a fourth at Vienna, in Austria; a fifth in Egypt; a sixth at Belgrade, in Servia, and a seventh at Amsterdam, in Holland. The third count merely specifies the Barletta lottery. The fourth count, like the first count, only refers generally to a lottery, describing the circular by number, date, heading, and address.

We do not know what the ground is for the claim that these lotteries thus described are not within the statute. The purpose of the statute was to prevent the postal system of the United States from being made an instrument for carrying on the lottery business, either in the circulation of advertisements of lotteries or in the carriage of lottery tickets or other evidences of the right to a chance in the lottery schemes. In carrying out such a purpose it is manifestly as important to prevent foreign lotteries from using the mail as those of this country. The evil which the law intends to keep the postal system from aiding, is the demoralizing effect upon the people of this country, produced by temptations to spend their money in gambling. The *locus* of the lottery is wholly immaterial. Its influence, when exerted across the Atlantic, is as pernicious as when exerted in this country, if only the means of communication are afforded. No question can be made, we think,

that circulars containing lists of the prizes at the drawing of a foreign lottery are as much in violation of section 3694, Revised Statutes, amended, as if they related to an American lottery.

This view is fully borne out by the authorities. (*Commonwealth* vs. *Dana*, 2 Metc., 329, 338; *The People* vs. *Sturdevant*, 23 Wend., 418; *Charles* vs. *The People*, 1 New York (Comstock), 180; *Grover* vs. *Morris*, 73 N. Y., 476; *People* vs. *Noelke*, 94 N. Y., 137.)

The fifth count of the indictment differs from the other four in averring that Horner caused a circular containing a list of prizes drawn at a lottery in Antwerp, Belgium, *to be delivered* by mail to Mrs. Schuchman. This is one of the offenses described in the section and the count is as free from criticism as those which precede it.

THE PLACE OF TRIAL.

The last clause in the section provides that any violator of the section may be tried "either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

The third clause of section 2 of Article III of the Constitution provides that the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed. The Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein

the crime shall have been committed, which district shall have been previously ascertained by law."

The language of section 3694, Revised Statutes, amended, certainly warrants a trial on the counts of the indictment in the southern district of Illinois, but such language is in violation of the foregoing constitutional restrictions, unless it is true that the misdemeanor charged was partly or wholly committed in that district. Take the charge in the fifth count first. There it is said that the accused caused to be delivered by mail in the southern district of Illinois a circular in violation of the section, which he had deposited in the post-office at New York, addressed to the person named, in the southern district of Illinois. Where one employs an unconscious agent or instrumentality to give effect to his criminal purpose in another district than that where he is bodily present, he commits the crime in the former district. Thereby he completes the act necessary to constitute the crime, and the district in which he commits the offense is the district in which that unconscious agent acts for him. The offense here described was "causing the circular to be delivered by mail." Horner caused the circular to be delivered in the southern district of Illinois. The fact that he deposited it in New York does not disconnect him from the act of the postmaster or letter-carrier in delivering the circular according to the direction which he put upon the letter in Belleville, Ill. Neither the postmaster nor the letter-carrier had knowledge of the contents of the letter. The delivery of the letter in the southern district of Illinois was as much the act of Horner in the latter district as if he had used for the purpose a pole long enough to reach from a point outside of the district

into the district or had fired it out of a gun. The crime described in the statute under which the fifth count is drawn is not completed except by the delivery of the letter to the person to whom it is addressed. The crime is committed, therefore, in the district where the letter is delivered. This is not an open question in this court. In the case *In re Palliser* (136 U. S., 257) it was decided that the offense of tendering a contract for the payment of money in a letter mailed in one district and addressed to a public officer in another, to induce him to violate his official duty, may be tried in the district in which the letter is received by the officer. Said Mr. Justice Gray in that case:

> The petitioner relies on those provisions of the Constitution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed. Article III, section 2; Amendments, Article VI.
>
> But the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "wherein the crime shall have been committed."
>
> * * * * * * *
>
> It is universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction the offender may be tried where the shot takes effect, and the only doubt is whether he can be tried where the shot is fired. (*Rex* v. *Coombes*, 1 Leach, 4th ed., 388; *United States* v. *Davis*, 2 Sumner, 482; *People* v. *Adams*, 3 Denio, 190, 207, and 1 N. Y., 173, 176, 179; Cockburn, C. J., in *The Queen* v. *Keyn*, 2 Ex. D., 233, 234.)
>
> When a crime is committed partly in one district

and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate; and Congress has accordingly provided that "when any offense against the United States is begun in one judicial district and completed in any other, it shall have been deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner and as if it had been actually and wholly committed therein." (Rev. Stat., § 731.)

When an offense is committed by means of a communication through the post-office, the sender has sometimes, as appears by the cases cited for the petitioner, been held to be punishable at the place where he mails the letter. (*United States* v. *Worrall*, 2 Dall., 384; *United States* v. *Bickford*, 4 Blatchford, 337; *Rex* v. *Williams*, 2 Campbell, 506; *The King* v. *Burdett*, 3 B. & Ald., 717, and 4 B. & Ald., 95; *Perkin's Case*, 2 Lewin, 150; *Regina* v. *Cooke*, 1 Fost. & Finl., 64; *The Queen* v. *Holmes*, 12 Q. B. D., 23; S. C., 15 Cox Crim. Cas., 343.) But it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed; and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, whether the unlawfulness of the communication through the post-office consists in its being a threatening letter (*The King* v. *Girdwood*, 1 Leach, 142; S. C., 2 East. P. C., 1120; *Esser's Case*, 2 East. P. C., 1125), or a libel (*The King* v. *Johnson*, 7 East., 65; S. C., 3 J., P. Smith, 94; *The King* v. *Burdett*, 4 B. & Ald., 95, 136, 150, 170, 184; *Commonwealth* v. *Blanding*, 3 Pick., 304; *In re Buell*, 3 Dillon, 116, 122), or a false pretense, or a fraudulent representation (*Regina* v. *Leech*, Dearsly, 642; S. C., 7 Cox Crim. Cas., 100; *The Queen* v. *Rogers*, 3 Q. B. D., 28; S. C., 14 Cox Crim. Cas., 22; *People* v. *Rathbun*, 21 Wend.,

509; *People* v. *Adams*, 3 Denio, 190, and 1 N. Y., 173; *Foute* v. *State*, 15 Lea (Tenn.), 712).

* * * * * * *

In the case before us, the offense charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that if any offense was committed in New York the offense continued to be committed when the letter reached the postmaster in Connecticut; and that if no offense was committed in New York, an offense was committed in Connecticut; and that, in either aspect, the district court of the United States for the district of Connecticut had jurisdiction of the charge against the petitioner.

The language of the learned justice is entirely applicable to the trial in the case at bar on the charge contained in the fifth count.

If one of the counts in the indictment is triable in the southern district of Illinois, it seems very clear that it was the duty of the district judge to issue the warrant, whatever may be said as to the other counts.

The other four counts are merely descriptions of the same act as that described in the fifth count in different language.

It may be that the offense of depositing a circular under section 3894 as amended is an offense so completed in the district where the deposit takes place as to prevent a trial of the offender in the district where the circular is received. But the other four counts

charge that Horner deposited the circulars in the New York post-office, and that they were carried by mail in the southern district of Illinois for delivery to Mrs. Schuchman in that district according to the direction on the circular.

Now, in addition to making the deposit and the delivery, misdemeanors, the statute also subjects to punishment any person "who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of this section." The sending is a continuous act until the destination is reached, and by the principle of the Palliser case, the sender may be tried in any district through which or into which the forbidden matter is sent. The charge in the first four counts is that Horner deposited in the mail the circular addressed to a person living in the southern district of Illinois, and that in accordance with the direction it was carried by mail in that district for delivery to the person addressed. This is certainly a charge that Horner caused a circular to be sent by mail into the southern district of Illinois, and as such it may be tried in the latter district.

SUFFICIENCY OF THE WARRANT OF REMOVAL.

The objection to the warrant on the ground that it remands the prisoner to the southern district to be tried on such counts of the indictment as he may legally be tried upon, and so does not inform the accused of the nature of his offense, hardly requires comment. The indictment is certainly specific enough. He may demur to any or all of the counts when he is called upon to plead and thus have the court determine which counts

he shall meet. The determination of the district judge in issuing the warrant of removal only is that there is at least one count in the indictment upon which Horner may be tried in Illinois, and that is enough.

IDENTITY OF THE HORNER ARRESTED WITH THE HORNER INDICTED.

Finally the identity of Horner with the person indicted is disputed. The person indicted is described in the indictment as late of the southern district of Illinois, and this is supposed to show that the Horner arrested, who is said to live in New York, could not be the man intended. This is entirely a question of fact which the district judge and the committing commissioner had full jurisdiction to consider and decide for the purpose of removal, and their decision will not be considered here on habeas corpus. (*In re Luis Oteiza y Cortes*, 136 U. S., 330.) The fact that Horner lived in New York only confirms his identity with the one charged, because the circular was deposited in New York and was headed with Horner's name as a banker in that city.

It is respectfully submitted that the order of the circuit court remanding the prisoner should be affirmed.

WM. H. TAFT,
Solicitor-General.